SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 201

DAVID HYUN, PETITIONER,

vs.

HERMAN R. LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the United States District Court in and for the Southern District of California, Central Division

No. 15743—T

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

Comes now Mary Hyun and petitions for a Writ of Habeas Corpus directed to Herman R. Landon, District Director, Immigration and Naturalization Service, and to any Sheriff, Marshal, Constable, or other peace officer having custody of the body of David Hyun, who hereinafter for the sake of convenience is referred to as petitioner, commanding him, the said Herman R. Landon, to have the body of petitioner before this Court at a time and place to be specified, to do and receive what shall then and there be considered concerning petitioner, together with the time and cause of his detention, and said Writ; that petitioner shall not be transferred nor removed pending said return from or out of the jurisdiction of this Court; and that pending hearing hereupon, petitioner may be restored to his liberty upon reasonable bond.

I.

That Mary Hyun is the duly wedded and legal wife of David Hyun and is authorized by the said David Hyun to file this petition for Habeas Corpus on [2*] his behalf.

II.

That petitioner is unlawfully and arbitrarily imprisoned and restrained of his liberty by respondent Herman R. Landon, District Director of the Immigration and Naturalization Service at Los Angeles, California.

III.

That respondent Herman R. Landon is the duly appointed and acting district director of the Immigration and Naturalization Service for the Los Angeles, California, district, and is charged with the administration, execution and enforcement of the immigration and naturalization laws of the United States within said district and within the Southern District of California.

IV.

That petitioner David Hyun is now and at all times since 1947 has been a resident of the County of Los Angeles and of the Southern District of California. He is married, the father of two minor sons, and is an architect by profession. Petitioner was born in Korea.

V.

That on or about October 21, 1950, petitioner was arrested by respondent and charged with being in the United States in violation of the Immigration

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Act of October 16, 1918, as amended, upon the ground that he was an alien who after entry was a member of the Communist Party. Following his arrest as aforesaid, hearings upon the charge stated in the warrant were held from time to time, at the conclusion of which the hearing officer recommended issuance of an order for petitioner's deportation according to law. Thereafter, the recommendation of the hearing officer was adopted by the Commissioner of Immigration and subsequently plaintiff's appeal from the Commissioner's order was dismissed, the said order then and thereby becoming final.

VI.

The statutes directly applicable herein are Section 20 of the Immigration Act of February 5, 1917, as amended (39 Stat. 890, 57 Stat. 553, 64 Stat. 1010) and the Act of October 16, 1918, as amended (40 Stat. 1012, 41 Stat. 1008, 54 Stat. 673). [3]

VII.

At all times throughout the deportation proceedings and whenever requested or required since the entry of the said final order of deportation on December 1, 1952, petitioner without exception has appeared at the times and places designated by respondent or his subordinates.

VIII.

On or about June 19, 1953, petitioner was notified in writing by respondent that petitioner must surrender himself on July 6, 1953, at the offices of respondent for deportation, no country of destina-

tion being named. Thereafter petitioner made repeated inquiry of respondent and his subordinates, both oral and written, as to the country to which respondent proposed to deport him. All of these inquires were rejected until July 2, 1953, on which date respondent by a subordinate notified petitioner orally that respondent was ready to deport petitioner to Korea and that all documents necessary therefor had been obtained.

IX.

Petitioner was born in Korea and since leaving his native land, has maintained a friendly and informed interest in its people and affairs. At all times since the accession to power of Syngman Rhee as President of the Republic of Korea, petitioner has expressed freely, widely and publicly his opinion that the Rhee administration is corrupt, tyrannical, hostile to democracy and incapable of serving the best interests of the majority of the Korean people. Petitioner is informed and believes and therefore alleges that his said views and his opposition to the Rhee government are known to that government.

Petitioner is informed and believes and therefore alleges, that it has been and is the policy and practice of the Rhee administration to employ terroristic methods against its opponents and to subject them to physical persecution including indefinite imprisonment, torture and death; and that as a known opponent of the said administration, petitioner, if deported to Korea, would himself be subject to such persecution.

X.

Petitioner is informed and believes and upon such information and belief alleges that a warrant for petitioner's deportation to Korea has been [4] issued pursuant to the said final order for deportation entered December 1, 1952, and that the aforesaid order requiring petitioner to surrender on July 6, 1953, has been made pursuant to such warrant.

XI.

That petitioner is informed and believes and upon such information and belief, alleges that unless, respondent is enjoined and restrained from deporting petitioner, respondent intends to and will deport petitioner or cause the deportation of said petitioner on July 6, 1953, without affording petitioner the opportunity to request or secure review by this or any Court of the said order of deportation as provided by law.

XII.

The administrative hearings had herein were unlawful in that the procedure denied to the petitioner due process of law; did not comport with the minimum standards of impartiality and denied to petitioner a fair hearing contrary to and in violation of the Fifth Amendment of the Constitution of the United States in that the Administrative hearings herein were conducted while the petitioner was in custody; the hearing officer was guilty of marked bias and prejudice, improperly applying a presumption of guilt against the petitioner herein; the

hearing officer permitted the taking of testimony by deposition in Hawaii over the objection and without the presence of petitioner.

XIII.

The order of deportation herein, the Findings of Fact, Conclusions of Law, the entire proceedings to deport petitioner, and all or any actions of the Government to achieve or seek to achieve that purpose are unlawful, illegal and void in that the Act of October 16, 1918, as amended, is on its face and as applied a bill of attainder, contrary to and in violation of Article 1 of the Constitution of the United States.

XIV.

The order of deportation herein the Findings of Fact, Conclusions of Law, the entire proceedings herein to deport petitioner and all or any actions of the Government herein to achieve or seek to achieve that purpose are unlawful, illegal, and void in that the Act of October 16, 1918, as amended, [5] deprives petitioner of his right to freedom of speech, freedom of the press, right of peaceable assembly and right to petition the Government for a redress of grievances, all in violation of rights protected by the Fifth Amendment to the Constitution of the United States, and further deprives petitioner of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

XV.

The said order of deportation, the Findings of

Fact, Conclusions of Law, the entire proceedings herein to deport petitioner and all other actions by the Government herein to achieve to seek to achieve that purpose are unlawful, illegal and void in that the provisions of Section 22 of the Internal Secuity Act of 1950, the applicable statute herein is an ex post facto law upon its face and is applied in that the Findings of the hearing officer are in substance and effect that the petitioner herein was a member of the Communist Party of the United States during 1945 and 1946, a time prior to the enactment of the aforesaid act, all of which is in violation of Article I, Section 9 (3) of the Constitution of the United States; moreover, constitutes a denial of due process of law in that it deprives petitioner of basic rights predicated on conduct antedating the penalizing statute herein, all in violation of the Fifth Amendment to the Constitution of the United States.

XVI.

That no previous application for Writ of Habeas Corpus has been made in this matter to any other court.

Wherefore, said petitioner prays that a Writ of Habeas Corpus may be granted directed to Herman R. Landon, District Director, Immigration and Naturalization Service, and to any Sheriff, Marshal, Constable, or other peace officer having custody of the body of petitioner, commanding him to have the body of petitioner before this Court at a time and place to be specified to do and receive what shall then and there be considered concerning peti-

tioner, together with the time and cause of his detention, and said Writ; that petitioner shall not be transferred nor removed pending said return from or out of the [6] jurisdiction of this Court; and that pending hearing hereupon petitioner may be restored to his liberty upon reasonable bond.

HERBERT W. SIMMONS, JR.,
and
MARGOLIS, McTERNAN and
BRANTON,

By /s/ JOHN W. PORTER,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed July 24, 1953. [7]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the reading of the verified petition of Mary Hyun on behalf of David Hyun on file herein and good cause appearing therefore,

It Is Hereby Ordered That Herman R. Landon, District Director, Immigration and Naturalization Service, show cause if any to have, before Judge Tolin in the above-entitled Court, at the United States Court House Building, 312 North Spring Street, Los Angeles, California, on the 3rd day of August, 1953, at 10 o'clock a.m., of said day, why petitioner, David Hyun, should not be discharged absolutely from the custody of respondent and

further why said petitioner should not be released from custody pending the hearing and determination of the petition for writ of habeas corpus herein. [9]

It Is Further Ordered that a copy of said petition, and a copy of this Order be served upon said District Director, Immigration and Naturalization Service, on the 24th day of July, 1953, before 5 p.m., of said day.

Dated: This 24th day of July, 1953.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed July 24, 1953. [10]

[Title of District Court and Cause.]

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

Herman R. Landon, District Director of the Immigration and Naturalization Service, United States Department of Justice, Los Angeles, California, Respondent herein, as and for his return to the Order to Show Cause why petitioner, David Hyun, should not be discharged absolutely from the custody of this respondent, and why a Writ of Habeas Corpus should not be granted in the above-entitled case, admits, denies and alleges as follows:

I.

Answering paragraphs I, IV and IX of petitioner's Petition for a Writ of Habeas Corpus respond-

ent neither admits nor denies the allegations therein contained for lack of sufficient knowledge or information thereon to form a belief as to their truth except that respondent admits that petitioner was born in Korea.

II.

Answering paragraph II of petitioner's Petition for a Writ of Habeas [11] Corpus, respondent denies that petitioner is unlawfully or arbitrarily imprisoned and restrained of his liberty by this respondent.

III.

Answering paragraphs III, V, VII, X and XVI of petitioner's Petition for Writ of Habeas Corpus, respondent admits the allegations therein except that the date of arrest mentioned in paragraph V of the Petition was October 31, 1950, instead of October 21, 1950.

IV.

Answering paragraph VI of petitioner's Petition for Writ of Habeas Corpus, respondent neither admits nor denies the allegations therein contained; alleges that they are conclusions of law and asks that they be stricken from the Petition.

V.

Answering paragraph VIII of petitioner's Petition for Writ of Habeas Corpus, respondent admits that petitioner's surrender on July 6, 1953, for deportation was demanded of petitioner's surety on June 18, 1953. Respondent denies that repeated inquiries as to the country of deportation were re-

jected until oral notice on July 2, 1953, but instead respondent alleges that in reply to inquiry of June 24, 1953, by petitioner's attorney, he was notified in writing that the Immigration and Naturalization Service proposed to effect deportation of petitioner to the country designated by him, or to Korea, or to such other country as might be appropriate under the provisions of Section 243(a) of the Immigration and Nationality Act. Respondent also alleges that in reply to further inquiry of June 30, 1953, by petitioner's attorney, said attorney was informed in writing on July 2, 1953, that the Immigration and Naturalization Service proposed to deport petitioner to Korea and that in the event that a claim of physical persecution was made, said attorney and petitioner would be afforded an opportunity to submit evidence in support of their claim.

VI.

Answering paragraph XI of petitioner's Petition for Writ of Habeas Corpus, respondent admits that on July 6, 1953, he was ready to execute the aforementioned outstanding final order requiring petitioner's deportation but respondent [12] denies that he ever had or now has any intention of precluding proper judicial review of said deportation order or preceedings.

VII.

Answering paragraphs XII, XIII, XIV and XV of petitioner's Petition for Writ of Habeas Corpus, respondent denies each and every allegation contained therein.

VIII.

For a Further Answer and Affirmative Defense Respondent Alleges:

That petitioner is in respondent's proper and lawful custody under an order of deportation issued on August 1, 1951, by the Assistant Commissioner, Adjudications Division, Immigration and Naturalization Service, which order became final on December 1, 1952, by dismissal of appeal thereon by the Board of Immigration Appeals, all of which more particularly appears from the Administrative Record of deportation proceedings which were had relating to petitioner, a certified copy of which will be offered into evidence at the time of hearing herein.

IX.

That petitioner has by his actions in filing first, a Complaint for Injunction and Declaratory Judgment on July 6, 1953, and secondly, this Petition for Writ of Habeas Corpus on July 24, 1953, interrupted his scheduled opportunity to present evidence to substantiate his claim of physical persecution if deported to Korea, based hitherto solely on his counsel's self-serving declarations with no probative evidence thereof as yet submitted for the consideration of the Attorney General, all of which is more particularly set forth in this respondent's affidavit dated July 29, 1953, attached hereto marked Exhibit "A" and made a part hereof.

X.

In the Immigration and Naturalization Service hearings held on November 22, 1950; March 13, 1951;

March 28, 1951; March 29, 1951, and April 19, 1951, and at all of the proceedings which support the aforementioned outstanding final order of deportation, as shown by the certified copy of Administrative Record of proceedings to be submitted to the Court at the hearing herein, petitioner was accorded due process of law under the Constitution of the United States. [13]

XI.

As shown by respondent's affidavit, Exhibit "A" attached hereto, petitioner is a danger to the internal security of the United States.

Wherefore, respondent prays that the Order to Show Cause herein be discharged and that the Petition for Writ of Habeas Corpus be denied.

Dated: July 30, 1953.

/s/ HERMAN R. LANDON,
District Director, Immigration and Naturalization Service, Respondent.

United States of America,
Southern District of California—ss.

Herman R. Landon, being first duly sworn, deposes and says:

That he is District Director of the Immigration and Naturalization Service, United States Department of Justice, respondent in the above-entitled action; that he has read the foregoing Return to Petition for Writ of Habeas Corpus and knows

the contents thereof; and that the same is true of his own knowledge except as to matters which are therein stated upon his information or belief and as to those matters that he believes it to be true.

[Seal] /s/ HERMAN R. LANDON.

Subscribed and sworn to before me this 30th day of July, 1953.

EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of California;

By /s/ MICHAEL F. LEONE,
Deputy. [14]

EXHIBIT A

State of California,
County of Los Angeles—ss.

Comes now, H. R. Landon, respondent herein, who deposes and states as follows:

1. That he is the District Director for the United States Immigration and Naturalization Service, Department of Justice, for the Los Angeles District, and as such is custodian of the records of the United States Immigration and Naturalization Service in said District;

2. That the records of the United States Immigration and Naturalization Service in his custody, with respect to the petitioner David Hyun, show

that the proceedings in deportation in his case are as follows:

(a) On August 1, 1951, a final order of deportation was made in his case by the Assistant Commissioner, Adjudications Division, Immigration and Naturalization Service, upon the finding that petitioner violated the Act of October 16, 1918, as amended (8 U.S.C.A. 137 (2)(C), 137-3, 1951, P.P.), in that after entry he was an alien who was a member of the Communist Party of the United States;

(b) An appeal from said final order of deportation was dismissed by the Board of Immigration Appeals on December 1, 1952;

(c) Pursuant to the provisions of Section 20(a) of the Act of February 5, 1917, as amended by Sec. 23 of the Internal Security Act of 1950 (8 U.S.C.A. 156(a), 1951 Pocket Part), a written notice was sent to petitioner on December 12, 1952, for his appearance at the Los Angeles, California office of the Immigration and Naturalization Service, for the purpose of permitting him to designate the country to which he wished to be deported. Said notice also informed him that upon his failure to so specify or if he did not have any choice of country, his deportation would be ordered to any of the places specified in Section 20 of the Immigration Act of February 5, 1917, as amended, 8 U.S.C.A. 156(a), (replaced on December 24, 1952, by Sec. 243 Immigration and Nationality Act, 8 U.S.C.A. 1253(a)), in the discretion of the government: [15]

(d) On December 17, 1952, petitioner specified Czechoslovakia as the country of his choice, and further stated that he had not applied for and had not received necessary permission to enter that country. On December 23, 1952, petitioner's attorney informed the Immigration and Naturalization Service that he had on behalf of petitioner "forwarded to the Czechoslovakia Embassy in Washington, D. C., a request for application papers, or any other document necessary to complete the entry of David Hyun into said country";

(e) On December 18, 1952, a warrant of deportation was issued directing petitioner's deportation to Czechoslovakia if that country would accept him, otherwise to Korea;

(f) On March 12, 1953, the Department of Justice addressed a communication to the Embassy of Czechoslovakia, Washington, D. C., requesting permission for petitioner to enter Czechoslovakia as a deportee from the United States. Czechoslovakia has failed to advise the Attorney General, within three months following such inquiry, whether that government would or would not accept petitioner into its territory;

(g) Upon the failure of Czechoslovakia to express its willingness to accept petitioner into its territory, either upon petitioner's application or the application of the Attorney General, within three months following such request, the Attorney General, acting upon authority granted to him in such

a case, by Section 243(a)(3), (8 U.S.C.A. 1253(a)(3)), then designated Korea, the country in which petitioner has testified he was born, as the place to which petitioner would be deported;

(h) This Service is in possession of a temporary passport of the government of the Republic of Korea presently entitling petitioner, David Hyun, to enter that country;

(i) On June 18, 1953, a written demand was made upon petitioner's surety for surrender of petitioner into the custody of an officer of the Immigration and Naturalization Service at Room 225, Rowan Building, 458 So. Spring Street, Los Angeles, California, on July 6, 1953, at 10:00 a.m. for deportation and a copy of the said demand was sent to petitioner's attorney; [16]

(j) On July 2, 1953, petitioner's attorney submitted a motion and request for stay of petitioner's deportation, pursuant to the provisions of Section 243(h) of the Immigration and Nationality Act (8 U.S.C.A. 1253(h)) and of 8 C.F.R. 243.3(B) wherein the claim was made that "Korea is a country in which the respondent, if deported there, would be subject to physical persecution, brutality and possible loss of his life";

(k) On July 2, 1953, a letter was addressed to petitioner's attorney by the direction of this respondent informing him that the motion and request for a stay of petitioner's deportation had been

denied and that regarding the claim that the petitioner would be subject to physical persecution if deported to Korea, he was informed that he should appear at Room 222, Rowan Building, 458 South Spring Street, Los Angeles, California, on July 7, 1953, at 10:00 a.m. at which time he would be afforded an opportunity to present evidence to substantiate his claim. However, following the filing on July 6, 1953, of the complaint for Injunction and Declaratory Judgment and issuance thereon of an Order to Show Cause and Temporary Restraining Order, these administrative proceedings to determine the merits of petitioner's claim of possible physical persecution if deported to Korea, were interrupted and postponed, pending the outcome of that judicial action;

3. This respondent repeats and reaffirms the allegations in the affidavit made by him on January 4, 1951, with respect to petitioner, David Hyun, in the prior judicial proceedings herein, entitled Carlson v. Landon, as reported in 187 Federal Reporter, 2nd Series, 991, at page 1000, as follows:

> "With respect to David Hyun, the petitioner herein, the Service is in possession of evidence showing that said petitioner has been a member of the Communist Party and has actively participated in its program; more specifically, that said petitioner was a member of the Communist Party in the Territory of Hawaii and was instrumental in reactivating the Communist Party in Hawaii in 1945; that he led

and participated in discussion groups on indoctrination of Communist philosophy, planning, strategy, and recruitment of members in the [17] Communist Party during the years 1946 and 1947; that he advocated redistribution of wealth and government ownership of industry, such as exists in Russia, and that these reforms would take place following the revolution in the United States; that said petitioner was instrumental in forming a Branch of the Hawaiian Civil Liberties Committee on the West Coast soon after his arrival in California from Hawaii in 1947 (an organization designated by the Attorney General as Communist, F. R. 315, No. 231); that he was Educational Director of the Westlake Section of the Communist Party in Los Angeles, California, in 1949."

4. Since the making by respondent of the aforementioned affidavit, further investigations concerning the petitioner, David Hyun, have developed the following additional facts (some of which have come from confidential sources which this respondent is prohibited from naming) as to said David Hyun's more recent activities:

(a) He has, during the past two years, when not in detention, regularly attended meetings, on an average of twice monthly, of the Los Angeles Committee for the Protection of the Foreign Born, the local arm of American Committee for the Protection

of the Foreign Born (which organization has been cited by the Attorney General of the United States as subversive and Communist, and cited by the Special Committee on Un-American Activities, Report of March 29, 1944, page 155, as "One of the oldest auxiliaries of the Communist Party of the United States"). On April 22, 1953, a petition was filed with the Subversive Activities Control Board by the Attorney General of the United States seeking an order requiring the registration, pursuant to Section 7(b), (c), (d) of the Internal Security Act of 1950 (50 U.S.C. 786(b), (c), (d)), of the American Committee for the Protection of the Foreign Born as a Communist-front organization. David Hyun has appeared before the above-mentioned meetings as speaker or chairman at approximately one-sixth of the said meetings. He has regularly contributed monthly dues or financial assessments to the said Committee. During the past two years David Hyun has been a member of the Communist Party [18] and a member of the Executive Board, the Steering Committee, and Chairman of the Deportees Committee of the said Los Angeles Committee for the Protection of the Foreign Born. He was also a delegate from the Los Angeles Committee for the Protection of the Foreign Born to the National Convention of the American Committee for the Protection of the Foreign Born, held in Chicago, Illinois, in November, 1951;

(b) He has, when not in detention, attended meetings of the California Emergency Defense

Committee, a Communist inspired, dominated and controlled organization, set up in August, 1951, to raise funds for the legal defense of defendants charged with violation of the Smith Act;

(c) He was in 1951 and 1952 a member of the Political Prisoners Welfare Committee, an organization inspired, dominated and controlled by the Communist Party, set up to provide financial and other assistance to families of Smith Act defendants or of persons under deportation proceedings as Communists;

(d) He has attended meetings and other functions of the Negro Labor Council, an organization inspired, dominated and controlled by the Communist Party;

(e) He has attended and been speaker at meetings of the American Women for Peace, American Peace Crusade, Southern California Peace Crusade and Trade Union Action Conference for Peace, at which latter conference he was the representative of the aforementioned Committee for the Protection of the Foreign Born, which so-called "Peace" meetings have followed the Communist line of the International Communist Movement and attacked the United States as a "war-mongering country whose prosperity depends upon a war-time economy";

(f) He has attended meetings of the Civil Rights Congress (an organization designated by the Attorney General of the United States as Com-

munist November 24, 1947, 13 F. R. 1471), and has been a principal speaker before it;

(g) He has attended meetings of such groups as (1) Jewish People's Fraternal Order, a subsidiary of the International Workers' Order, [19] which latter was cited by the Attorney General of the United States on April 22, 1953, in a petition to the Subversive Activities Control Board seeking an order requiring its registration as a Communist-front organization; (2) Committee to Secure Justice for the Rosenbergs, and the 1952 May Day Celebration, whose program was composed of speakers glorifying the Soviet Union and Stalin.

5. Following the dismissal by this Court, on July 17, 1953, of petitioner's complaint for an injunction and declaratory judgment (Civil No. 15693-T) a written notice was, on July 27, 1953, by direction of this respondent, sent to the petitioner granting him an interview concerning his claim that he would face physical persecution if deported to Korea with an officer of the Immigration and Naturalization Service, at Detention Quarters, Terminal Island, California, on August 6, 1953, at 10:00 a.m., an earlier date being unsatisfactory to petitioner's attorney. The said notice informed petitioner that he may present evidence in support of his claim, and that his attorney, to whom a copy of the notice was sent, may be present.

/s/ H. R. LANDON,
District Director, Immigration and Naturalization Service.

Subscribed and sworn to before me this 29th day of July, 1953.

EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of California, Central Division.

By /s/ MICHAEL F. LEONE,
Deputy.

[Endorsed]: Filed July 30, 1953. [20]

[Title of District Court and Cause.]

TRAVERSE TO RETURN

Comes now the petitioner, David Hyun, by Mary Hyun, his wife, and traverses the return of respondent herein as follows:

I.

Petitioner refers to and realleges each and all the allegations of his petition for writ of habeas corpus on file herein and by this reference incorporates the same as a part hereof as if fully set forth again.

II.

Further traversing Par. VIII of said return, petitioner denies that he is in respondent's proper and lawful custody and alleges that such custody at all times was and is contrary to law as hereinbefore alleged.

III.

Further traversing Par. IX of said return petitioner alleges that proceedings to determine the risk of physical persecution of petitioner if deported to Korea were taken off calendar by respondent upon the filing of the complaint [33] therein referred; and petitioner further alleges that such proceedings were and are premature until judicial review of petitioner's deportability has been had and that such proceedings will be unnecessary unless the determination of deportability should ultimately be sustained by the courts.

IV.

Further traversing Par. V of said return, petitioner denies that he has been accorded due process of law under the Constitution of the United States.

V.

Further traversing Par. XI of said return, petitioner neither admits nor denies the allegations thereof and prays that said paragraph be stricken from the return as irrelevant, immaterial and impertinent pursuant to his motion to strike the same filed herewith.

VI.

Further traversing said return, petitioner alleges that said deportation order is not based upon reasonable, substantial and probative evidence, and is contrary to the evidence and the law, and that error in law was committed at the hearing by the hearing officer and duly excepted to by petitioner.

Wherefore, petitioner prays that the writ may issue in accordance with the prayer of his petition.

HERBERT W. SIMMONS, JR.,
and
MARGOLIS, McTERNAN and
BRANTON,

By /s/ JOHN W. PORTER,
Attorneys for Petitioner.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 6, 1953. [34]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF H. R. LANDON

United States of America,
Southern District of California,
Central Division, Los Angeles—ss.

H. R. Landon, respondent herein, being duly sworn, upon his oath, deposes and states as follows:

1. Supplementing his affidavit of July 29, 1953, Exhibit "A" of respondent's return to petition for writ of habeas corpus, this deponent states that by "David Hyun's more recent activities" deponent meant and now states that the confidential records of the Immigration and Naturalization Service in respondent's custody indicate that petitioner David

Hyun has engaged in the activities shown in paragraph 4 of deponent's aforementioned affidavit ever since petitioner's release from custody under Court bond of $5,000.00 on April 30, 1951 (in accordance with the Order of the Supreme Court of that date, 341 U. S. 918, 71 S.Ct. 744), and that said activities have continued to the date of commencement, July 6, 1953, of petitioner's present detention.

2. Referring to subparagraph (a) of paragraph 4 of deponent's said [36] affidavit of July 29, 1953, deponent now states that the said American Committee for the Protection of the Foreign Born was cited by the Attorney General of the United States as subversive and Communist on May 27, 1948 (13 F.R. 3067), pursuant to authority contained in Executive Order No. 9835, dated March 21, 1947 (12 F.R. 1935).

3. Referring to subparagraph (b) of said paragraph 4 of deponent's affidavit of July 29, 1953, dependent now states that the California Emergency Defense Committee mentioned therein was designated as subversive by the Attorney General of the United States on July 21, 1953, pursuant to the authority contained in Executive Order No. 10450, dated April 27, 1953 (18 F.R. 2489).

4. Referring to subparagraph (c) of said paragraph 4 of deponent's affidavit of July 29, 1953, deponent now states that the Political Prisoners'-Welfare Committee mentioned therein was designated as subversive by the Attorney General of the

United States on July 21, 1953, pursuant to the authority contained in Executive Order No. 10450, dated April 27, 1953, and (18 F.R. 2489).

5. Referring to subparagraph (d) of said paragraph 4 of deponent's affidavit of July 29, 1953, deponent now states that the full name of the Negro Labor Council mentioned therein is National Negro Labor Council, to which organization, on July 21, 1953, a notice was sent by the Attorney General of the United States of his proposed designation of it as subversive, pursuant to the authority contained in Executive Order No. 10450, dated April 27, 1953 (18 F.R. 2489), and that the said organization has filed a Notice of Contest thereon.

6. Referring to subparagraph (e) of said paragraph 4 of deponent's affidavit of July 29, 1953, deponent now states that the American Women for Peace and American Peace Crusade are organizations to which were sent, on July 21, 1953, notices by the Attorney General of the United States of his proposed designation of each of them as subversive, pursuant to the authority contained in Executive Order No. 10450, dated April 27, 1953 (18 F.R. 2489).

7. Referring to subparagraph (f) of said paragraph 4 of deponent's affidavit of July 29, 1953, deponent now states that petitioner, David Hyun, has regularly attended meetings several times monthly from May, 1951, to June, 1953, of the Civil Rights Congress mentioned therein, inclusive, that

he has [37] officiated as Chairman at some of its said meetings, that the said Civil Rights Congress was designated by the Attorney General of the United States as Communist on November 27, 1947 (13 F.R. 1471), pursuant to the authority contained in Executive Order No. 9835 (12 F.R. 1935) and that said organization was redesignated as such on May 6, 1953 (18 F.R. 2619), pursuant to the authority contained in Executive Order No. 10450, dated April 27, 1953 (18 F.R. 2489).

8. Referring to subparagraph (g) of said paragraph 4 of deponent's affidavit of July 29, 1953, deponent now states that the Jewish People's Fraternal Order mentioned therein, was designated as Communist by the Attorney General of the United States on September 5, 1950 (15 F.R. 6307), pursuant to the authority contained in Executive Order 9835, dated March 21, 1947 (12 F.R. 1935) and said organization was redesignated as such on May 6, 1953, by the Attorney General of the United States, pursuant to the authority contained in Executive Order No. 10450, dated April 27, 1953 (18 F.R. 2489). Further, with reference to the International Workers' Order mentioned therein, deponent now states that the said organization was designated as Communist on November 24, 1947 (13 F.R. 1471), pursuant to the authority contained in Executive Order No. 9835 (12 F.R. 1935) and the said organization was redesignated as such on April 29, 1953 (18 F.R. 2741), by the Attorney General of the

United States, pursuant to the authority contained in Executive Order No. 10450 (18 F.R. 2489); and that a petition by the Attorney General of the United States, dated April 22, 1953, seeking registration of the said International Workers' Order as a Communist-front organization, pursuant to Section 7(b), (c) and (d) of the Internal Security Act of 1950 (50 USC 786 (b), (c), (d)), is now pending before the Subversive Activities Control Board.

9. That deponent has proceeded and is now proceeding with all due dispatch in petitioner's case to effect petitioner's departure from the United States under the outstanding final Order of Deportation. On June 17, 1953, deponent caused to be obtained a reservation from the American President Lines for the transportation by them of petitioner to Pusan, Korea, to commence with a sailing from San Pedro, California, on July 18, 1953. Deponent was then in possession of a temporary passport issued in petitioner's name, valid to [38] August 5, 1953, for petitioner's entry into the Republic of Korea (a true copy of which is attached to the original hereof for the Court's use). Again, deponent now states that he has been at all times since July 6, 1953, and is now, ready to execute the Warrant of Deportation hitherto issued pursuant to the authority of the outstanding final Order of Deportation herein. This the deponent has been prevented from doing because of the filing, on July 6, 1953, of petitioner's complaint for an injunction and declaratory judg-

ment (Civil No. 15693-T) and, following its dismissal, the filing of this action on July 24, 1953.

/s/ H. R. LANDON,
District Director, Immigration and Naturalization Service.

Subscribed and sworn to before me this 10th day of August, 1953.

EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of California, Central Division;

By /s/ RAY E. GRIFFIN,
Deputy. [39]

In the District Court of the United States, Southern District of California, Central Division

No. 15743-HW

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

MEMORANDUM OPINION

An order to show cause why the petitioner should not be released from custody having heretofore been issued and the matter having been submitted for decision; it appearing to the court that there is sufficient evidence to support the warrant of deportation as disclosed from the records of the Immigration and Naturalization Service; the entire record having been submitted to the court for review and the court having reviewed said record;

It Is Hereby Ordered that the order to show cause heretofore issued be and is hereby dismissed, and

It Is Further Ordered that the petition for the issuance of a writ of habeas corpus be and is hereby denied, and

It Is Further Ordered that the custody of petitioner be not disturbed in accordance with the rul-

ings of the Circuit Court in the Carlisle matter, under opinion dated June 26, 1953. I view the [75] ruling of this circuit as binding upon this court until the Supreme Court rules to the contrary. I recognize Mr. Justice Douglas has made a different ruling in the Carlisle case but I do not feel that I am bound to accept as a precedent the ruling of an individual member of the Supreme Court.

Besides, I feel that the Carlisle case presents a different picture entirely from the case at bar. In this matter the Immigration and Naturalization Service was actually in the process of deporting the petitioner under a warrant of deportation at the time of the filing of the writ after a full hearing and review by the Board of Immigration Appeals.

If the petitioner is to be granted his liberty while the matter grinds its way through the usual and laborious processes of the reviewing courts, the results will make a mockery of the government's attempt to exclude aliens that Congress has held to be undesirable.

Dated: This 21st day of August, 1953.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed August 21, 1953.

Docketed and entered August 21, 1953. [76]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that David Hyun, petitioner above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order denying writ of habeas corpus herein and dismissing the petition therefor made on August 21, 1953, and entered on August 22, 1953.

HERBERT W. SIMMONS, JR.,
and
MARGOLIS, McTERNAN and
BRANTON,

By /s/ JOHN W. PORTER,
Attorneys for Petitioner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 25, 1953. [77]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 84, inclusive, contain the original Petition for Writ of Habeas Corpus; Order to Show Cause; Return to Petition for Writ of Habeas Corpus; Motion to Strike Portions of Return and of Affidavit; Traverse to Return; Supplemental Affidavit of H. R. Landon; Petitioner's Memorandum in Support of Application for Writ of Habeas

Corpus; Respondent's Memorandum of Points and Authorities in Opposition to Petitioner's Written Argument on Petition for Habeas Corpus; Memorandum Opinion; Notice of Appeal; Notice to Clerk to Prepare Record on Appeal; and Appellee's Counter-Designation of Record which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 30th day of September, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14058. United States Court of Appeals for the Ninth Circuit. David Hyun, Appellant, vs. Herman R. Landon, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 1, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14058

DAVID HYUN,

Appellant,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

DESIGNATION OF POINTS ON APPEAL

David Hyun, the appellant herein, hereby designates the following as the points upon which he intends to rely within appeal:

1. Whether the taking of depositions of witnesses for the government in Honolulu, T. H., out of the presence and over the objection of the appellant constituted a denial to the appellant of the right to confront the witnesses against him, in violation of his right to a fair hearing and due process of law.

2. Whether the admission of the testimony of witnesses taken by deposition in Hawaii and overruling of all of appellant's objections to questions and the denial of all of appellant's motions to strike answers upon the reading of such depositions into the record at the deportation hearing constituted prejudicial errors of law and amounted to denial to

appellant of a fair hearing and due process of law.

3. Whether, disregarding the testimony of the said witnesses who testified by deposition in Hawaii, the said final order of deportation was based upon reasonable, substantial and probative evidence.

4. Whether even if the testimony of said witnesses is considered, the said final order of deportation was based upon reasonable, substantial and probative evidence.

5. Whether the appellant was denied a fair hearing and due process of law by the bias and prejudice of the hearing officer, shown upon the record.

6. Whether the order of deportation herein and the proceedings leading thereto were and are illegal and void in that the statute upon which they were based, namely, the Act of October 16, 1918, as amended, is unconstitutional both on its face and as applied to this appellant. Included in this question are the following points:

(a) Whether the statute is a bill of attainder within the meaning of Article I of the Constitution of the United States.

(b) Whether the said statute is an ex post facto law within the meaning of Article I, Sec. 9(3) of the Constitution of the United States and thereby deprives the appellant of due process of law in violation of the Fifth Amendment thereto.

(c) Whether the said statute abridges the appellant's liberty of speech, assembly and petition without due process of law in violation of his rights under the First and Fifth Amendments to the Constitution of the United States.

Dated: This 14th day of October, 1953.

HERBERT W. SIMMONS, JR.,
and
MARGOLIS, McTERNAN and
BRANTON,

By /s/ JOHN W. PORTER,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 16, 1953.

[fol. 44] In United States Court of Appeals for the Ninth Circuit

Minute Entry of Argument and Submission—August 10, 1955 (omitted in printing)

[fol. 45] In United States Court of Appeals for the Ninth Circuit

Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—January 31, 1955

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 46] In United States Court of Appeals for the Ninth Circuit

No. 14,058

David Hyun, Appellant,

vs.

Herman R. Landon, District Director, Immigration and Naturalization Service, Appellee

Appeal from the United States District Court, Southern District of California, Central Division

Opinion—January 31, 1955

Before Stephens and Chambers, Circuit Judges and Clark, District Judge

Stephens, Circuit Judge:

David Hyun appeals from a judgment of the United States District Court, denying and dismissing his petition

for the writ of habeas corpus in which appellant sought release from the custody of appellee who was holding him under a final order of deportation. Appellee Landon is the District Director of the Immigration and Naturalization Service.

Appellant is a native of Korea and asserts citizenship of China. He was admitted to the United States at Honolulu, Territory of Hawaii, on May 26, 1924, at which time he was seven years old. He was admitted to the continental United States at Los Angeles, California, on September 1, 1947. A warrant for his arrest in deportation proceedings was issued and served on him on October 21, 1950, in which appellant was charged as an alien who, after entry, [fol. 47] had been a member of the Communist Party of the United States.[1] Pursuant to the warrant, Hyun was taken into custody pending determination of his deportability.

Hearings were started on November 22, 1950, at which time the hearing officer granted a motion by the examining officer to take the depositions of four witnesses in Honolulu. Timely notice was given and appellant's counsel was informed that appellant could be present, could submit written interrogatories and could present witnesses, or could be represented by counsel. Accordingly, depositions were taken in Honolulu on December 18, 1950, but appellant was not present or represented. Nor did he submit direct interrogatories.

On March 28 and 29, 1951, the deportation hearing was resumed, at which time appellant's counsel made specific objections to certain questions and answers contained in the Honolulu depositions. At this time appellant disclaimed any desire to present cross interrogatories to the Honolulu witnesses or to present witnesses of his own. Appellant testified but refused to answer any ques-

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[1] The warrant charged Hyun with deportability for violation of the "Act of October 16, 1918, as amended, in that he has been after entry a member of the following class set forth in § 1(2)(c) of said Act: an alien who was a member of the Communist Party of the United States. 8 U.S.C.A. 137(2)(c) 1951 pocket part".

tion concerning communist party membership on the grounds that it might tend to incriminate him and that it violated his rights under the first amendment to the Constitution of the United States. On April 19, 1951, appellant once again stated that he would not submit cross interrogatories to the Honolulu witnesses. The hearing officer, relying only on the depositions of Uesugi and Izuka, found the appellant deportable. The finding of the hearing officer was adopted by the Assistant Commissioner and appellant was ordered deported. Subsequently, the Board of Immigration Appeals dismissed appellant's appeal and the action from which the instant appeal is taken was filed on July 24, 1953.

The Taking of the Depositions in Hawaii

It is contended by appellant that the action of the Immigration Service in taking the depositions of Uesugi and [fol. 48] Izuka in Honolulu, while he was in custody in California, deprived him of the essential ingredients of due process of law. The argument is that not only was Hyun in the custody of appellee at the time the depositions were taken but that he was financially unable to transport his counsel to Honolulu or procure Honolulu counsel to represent him at the depositions. In view of the comparative financial resources of Hyun and the government of the United States, and in further consideration of the plethora of government transportation between Hawaii and the west coast, it is appellant's contention that the government should have transported the witnesses to the west coast for the depositions, or in the alternative provided transportation to Hawaii for Hyun and his attorney. Failure to do either, it is alleged, deprived appellant of essential ingredients of due process of law.[2]

An alien in deportation proceedings must be afforded due process of law, including a fair hearing, *Wong Yang Sung*

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[2] Circumstances relating to adequate counsel for persons charged with Communist adherence indicate that it would not be unreasonable for the trier of fact to disbelieve that appellant could not be represented at the Honolulu hearings.

v. *McGrath,* 339 U. S. 33, and indispensable to a fair hearing are reasonable notice, the right to examine witnesses and to testify and to present witnesses and to be represented by counsel, all of which appellant had. This court has repeatedly held that financial inability of an alien to insure attendance of himself or his attorney, or both, at the place where depositions are being taken is not a denial of due process. As was stated in *Bhagat Singh* v. *McGrath,* 1939, 9 Cir., 104 F. 2d 122, 123:

> "Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition * * * We have heretofore decided that the fact that an alien is financially unable to travel to a place where he could cross examine the witnesses, or send an attorney is not a denial of the right of cross examination."

See also *Channan Singh* v. *Haff,* 1939, 9 Cir., 102 F. 2d 303; and *Kishan Singh* v. *Director,* 1936, 9 Cir., 83 F. 2d 95. See, [fol. 49] too, *Berkman* v. *Tillinghast,* 1932, 1 Cir., 58 F. 2d 621, 622; *Hale* v. *Henkel,* 1906, 201 U. S. 43.

Cases cited by appellant to sustain the view that the government erred in not insuring the presence of Hyun at the taking of the depositions, are not applicable to the instant case:

> *Maltez* v. *Nagle,* 1928, 9 Cir., 27 F. 2d 835—The hearing officer refused to produce for examination persons whose statements were ex parte;
>
> *Caranica* v. *Nagle,* 1928, 9 Cir., 23 F. 2d 545;—It was held that the hearing was not unfair where cross examination was not allowed as to a witness whose testimony had been received but whose testimony was not considered as to the decision;
>
> *In re Sugano,* 1930, D. C., Calif., 40 F. 2d 961—The hearing was held unfair where proper cross-examination had been denied.

Failure to assert one's rights merely because to do so would necessitate some inconvenience can only be construed as a waiver of the right. *Kishan Singh* v. *Director,* 1936, 9 Cir., 83 F. 2d 95.

Rulings of the Hearing Officer

When the depositions of the Honolulu witnesses were offered in evidence at the Los Angeles hearings of March 28 and 29, 1951, appellant objected to certain of the questions or answers which he felt were improper under established rules of evidence. The hearing officer seriatim overruled appellant's objections. Appellant argues that this action of the hearing officer admitted a mass of incompetent evidence which fatally corrupted both the hearing and the record. It was strongly stated by appellant's counsel both in the briefs and at the hearing that the conduct of the presiding officer bespoke "a marked lack of that degree of judicial objectivity which a fair hearing connotes." It would seem clear that the action of the hearing officer in rejecting all of appellant's motions and objections was not in and of itself a denial of due process of law, without a showing that the objections were well taken, and that the action actually resulted in a denial of due process.

[fol. 50] It is well settled that the power of Congress to regulate the deportation of aliens is plenary and only in the case of extreme abuse will the courts intervene. As stated in *Carlson* v. *Landon*, 1952, 342 U. S. 524, 536, "* * * it is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country is deemed hurtful." See also: *Harisiades* v. *Shaughnessy*, 1952, 342 U. S. 580; *Shaughnessy* v. *Mezei*, 1953, 345 U. S. 206; *Bugajewitz* v. *Adams*, 1913, 228 U. S. 585, 591; *Ng Fung Ho* v. *White*, 1922, 259 U. S. 276, 280; *Ocon* v. *Landon*, Dec. 1954, 9 Cir., — F. 2d —; *Galvan* v. *Press*, 1953, 9 Cir., 201 F. 2d 302; *Carlson* v. *Landon*, 1950, 9 Cir., 186 F. 2d 183. Consequently, when the Supreme Court held the provisions of the Administrative Procedures Act [3] applicable to deportation hearings, *Sung* v. *McGrath*, 1950, 339

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[3] Title 5 U.S.C.A. § 1001 et seq., June 11, 1946, c. 324 § 2, 60 Stat. 237; as amended Aug. 8, 1946, c. 870, Title III, § 302, 60 Stat. 918; Aug. 10, 1946, c. 951, Title VI, § 601, 60 Stat. 993; March 31, 1947, c. 30, § 6(a), 61 Stat. 37; June 30, 1947, c. 163, Title II, § 210, 61 Stat. 201; March 30, 1948, c. 161, Title III, § 301, 62 Stat. 99.

U. S. 333, Congress subsequently specifically exempted such proceedings from the requirements of the Act.[4] The procedure to be followed in deportation proceedings is presently embodied in the Immigration and Nationality Act.[5] *Marcello* v. *Ahrens*, 1954, 5 Cir., 212 F. 2d 830, 836; *Galvan* v. *Press*, 1953, 9 Cir., 201 F. 2d 302, 304.

In this connection it is settled that deportation proceedings are civil in nature, not criminal. *Carlson* v. *Landon*, 1952, 342 U. S. 524; *Bhagat Singh* v. *McGrath*, 1939, 9 Cir., 104 F. 2d 122.

Traditionally, the formal exclusionary rules of evidence present in judicial proceedings have been relaxed in administrative practice. As stated by this court in *Scheeps v. Carmichael*, 1949, 9 Cir., 177 F. 2d 391, 395: "Common law rules of evidence are not based in constitutional interdictions and administrative tribunals are not bound by such rules except those perpetuated in governing regulations." [fol. 51] See also the following cases by this court:

Willapoint Oysters v. *Ewing*, 1949, 9 Cir., 174 F. 2d 676, 690;
Kunimori Ohara v. *Berkshire*, 1935, 9 Cir., 76 F. 2d 204;
Singh v. *Director*, 1938, 9 Cir., 96 F. 2d 969, 971;
Ex Parte Shigenari Mayemura, 1931, 9 Cir., 53 F. 2d 621.

This rule is followed by the Supreme Court, *N.L.R.B.* v. *Donnelly Co.*, 1947, 330 U. S. 219, and the other circuits. *Rhodes Pharmacal Co.* v. *F.T.C.*, 1953, 7 Cir., 208 F. 2d 382, 387; *Tassari* v. *Schmucker*, 1931, 4 Cir., 53 F. 2d 570, 572; *Murdoch* v. *Clark*, 1931, 1 Cir., 53 F. 2d 155, 156; *Hayes* v. *Hatges*, 1938, 8 Cir., 94 F. 2d 67, 68. Under this rule both opinion and hearsay evidence have been deemed admissible. In *Ex Parte Seisuke Fukumoto*, 1931, 9 Cir., 53 F 2d 618, certain immigration inspectors were permitted to state their opinions from viewing photographs that persons bearing different names were actually one and the same alien.

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[4] Supp. Approp. Bill Rider, Sept. 27, 1950, 64 Stat. 1048.

[5] Title 8 U.S.C.A. § 1252(b), June 27, 1952, c. 477, Title II, Ch. 5, § 242, 66 Stat. 208.

In United States v. *Wallis,* 1922, 2 Cir., 279 F. 401, the court said at page 403: "Since the only legal limitation upon departmental procedure is that a hearing, fair though summary must be accorded *hearsay evidence is admissible.*" [Emphasis added]. See also *Morrell* v. *Baker,* 1920, 2 Cir., 270 F. 577; *United States* v. *Uhl,* 1920, 2 Cir., 266 F. 34; and *Christianson* v. *Zerbst,* 1937, 10 Cir., 89 F. 2d 40. Furthermore, contrary to appellant's contention the mere fact that incompetent evidence was received and considered does not establish want of due process in the hearing such as would require a reversal on that ground. *Tisi* v. *Tod,* 1924, 264 U. S. 131; *Vajtauer* v. *Comm'r of Immigration,* 1927, 273 U. S. 103; and *Ex Parte Jurgans,* 1927, 17 F. 2d 507. See, also, *United States* v. *O'Rourke,* 1954, 8 Cir., 211 F. 2d 609, and the collection of authority contained therein at page 611.

The Substantiality of the Evidence

It is next urged by appellant that the deportation order cannot stand as it is not based upon reasonable substantial and probative evidence as required by the Act.[6] (*Rubin-*
[fol. 52] *stein* v. *Brownell,* 1953, C.A., D.C., 206 F. 2d 449, affirmed by a divided court, 98 L. Ed. 234.) The argument is that of the four depositions taken in Honolulu, two were disregarded by the immigration authorities in arriving at their decision. Hence the order to deport Hyun is based solely upon the testimony of Uesugi and Izuka, there being no other evidence to sustain the substantive charge of membership in the Communist Party of the United States. Appellant then attacks the testimony of these witnesses on the basis of non-responsive and voluntary answers and general understandability. The testimony of Uesugi was characterized at one point as being given "with vagueness approaching unintelligibility," while Izuka was labeled a wholly incompetent witness and his testimony such as to corrupt and debase the entire proceeding. As a conclusion, appellant states that this hearing was in effect an ex parte hearing in his absence.

We have read and studied the depositions as a whole, and

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[6] 8 U.S.C.A. § 1252(b)(4), June 27, 1952, 477, Title II, Ch. 5, § 242, 66 Stat. 208.

we are unable to agree with appellant's contentions. Both Uesugi and Izuka testified that they had joined the Communist Party in Honolulu and had come in contact with appellant at Communist meetings, as members. This has not been denied by appellant. Both this court and the Supreme Court of the United States have held that an inference may be drawn from the refusal of an alien to testify on his own behalf in deportation proceedings. *Bilokumsky* v. *Tod*, 1923, 263 U. S. 149, 153. And see *Vajtauer* v. *Comm'r of Immigration*, 1927, 273 U. S. 103, and *Kunimoro Ohara* v. *Berkshire*, 1935, 9 Cir., 76 F. 2d 204; *Chan nom. Gee* v. *United States*, 1932, 9 Cir., 57 F. 2d 646, 650.

The Constitutional Question

At the time the briefs in the instant case were written, the Supreme Court had recently decided in *Galvan* v. *Press*, 1954, 347 U. S. 522, that the statute attacked here [7] was constitutional and that it did not deprive aliens of due process of law by dispensing with proof of the character of the Communist Party in deportation proceedings. Also considered and decided negatively was the question of whether support or demonstrated knowledge of the Communist Party's advocacy of violence was intended to be a prerequisite to deportation. Subsequently the court granted certiorari in *Garcia* v. *Landon*, 279 Misc., — U. S. [fol. 53] —, 74 S. Ct. (Adv. Ops) 873, a case in which the constitutionality of deportation under the instant statute was upheld upon authority of the *Galvan* case. As a result, a petition was filed seeking a rehearing in *Galvan* v. *Press*. Both the *Garcia* appeal and the *Galvan* petition for rehearing were pending at the time the briefs in the instant case were filed. Appellant treated the decision in *Galvan* as not yet final and argued at length the constitutional questions which were treated therein. Thereafter and during the October, 1954, term of court, *Garcia* was dismissed as moot and the petition for rehearing in *Galvan* was denied. *Galvan* thus becomes final, and the holding that the Internal Security Act of 1950 is constitutional is controlling in the instant case. The Supreme Court in commenting on the action of Congress in making present or prior membership of an alien in the Communist Party in and of itself ground

for deportation, stated at page 529 (347 U. S. 522), "Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."

The judgment of the district court is affirmed.

[File endorsement omitted.]

[fol. 54] In United States Court of Appeals for the Ninth Circuit

No. 14,058

David Hyun, Appellant,

vs.

Herman R. Landon, District Director, Immigration and Naturalization Service, Appellee

Judgment—Filed and Entered January 31, 1955

Appeal from the United States District Court for the Southern District of California, Central Division

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

[fol. 55] In United States Court of Appeals for the Ninth Circuit

Order Denying Petition for Rehearing—April 7, 1955

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed March 2,

1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

[fol. 56] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 57] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 201

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1] **Petitioner's Exhibit "A"**

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

July 16, 1953

CERTIFICATION

By virtue of the authority vested in me by Title 8, Code of Federal Regulations, Section 2.1, a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I hereby certify that the annexed documents are originals, or copies thereof, from the records of the said Immigration and Naturalization Service, Department of Just-

tice, relating to David Hyun, File No. 1600-61258 & A3 611 569, of which the Attorney General is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.

In witness whereof I have hereunto set my hand and caused the seal of the Department of Justice, Immigration and Naturalization Service, to be affixed, on the day and year first above written.

(S.) Albert Del Guercio, Acting District Director, Immigration and Naturalization Service. (Seal.)

[fol. 2] UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE

Los Angeles, California

WARRANT—DEPORTATION OF ALIEN—December 18, 1952

No. 1600-61258 & A3 611 569

To: District Enforcement Officer, Los Angeles, California, Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized immigrant inspector, and upon the basis thereof, an order has been duly made that the alien David Hyun who entered the United States at Honolulu, Territory of Hawaii on the 26th day of May 1924 is subject to deportation under the following provisions of the laws of the United States to wit:

> The Act of October 16, 1918, as amended, in that he has been, after entry, a member of the following class, set forth in Section 1 of said Act: An alien who was a member of the Communist Party of the United States.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to Czechoslovakia if that country will accept him, otherwise, to Korea at the expenses of the Appropriation, "Salaries and Expenses Immigration and Naturalization Service, 1953" in-

cluding the expenses of an attendant if necessary. For so [fol. 3] doing this shall be your sufficient warrant. Witness my hand and seal this 18th day of December, 1952.

Albert Del Guercio, Acting District Director.

[fol. 4] BOARD OF IMMIGRATION APPEALS

ORDER THAT APPEAL FROM DECISION OF ASSISTANT COMMISSIONER ON AUGUST 1, 1951, BE DISMISSED—December 1, 1952

File: A-3611569—Los Angeles (1600/61258).

In re: David Hyun.

In Deportation Proceedings.

In Behalf of Respondent: Blanche Friedman, Esq., 220 Broadway, New York, N. Y. and Richard W. Petherbridge, Esq., 257 South Spring Street, Los Angeles, California and Isidore Englander, Esq. (heard March 12, 1952), 205 East 42nd Street, New York, N. Y.

Charges:

Warrant: Act of October 16, 1918, as amended—After entry alien who was member of Communist Party of United States.

Application: That appeal be sustained; or that the proceedings be reopened.

Detention Status: Released under bond.

[fol. 5] This is an appeal from the decision of the Assistant Commissioner on August 1, 1951, finding this respondent deportable on the charge in the warrant of arrest and directing that he be deported pursuant to law.

In oral argument and in brief submitted by counsel, all of the constitutional questions relating to due process, violation of the First Amendment, Bill of Rights and Attainder, and unfair and impartial hearing have been argued. In addition thereto, counsel contends that the Act of October 16, 1918, as amended in 1940, is unconstitutional insofar as it is applicable to this respondent. Counsel specifically requests that the case be reopened for rehearing to incorporate the testimony of witnesses to supplement the evidence alleged to have been taken in the form of depositions

or sworn statements from persons in the Territory of Hawaii, with no opportunity for the alien to cross-examine such deponents. Counsel believes that there is insufficient relevant and material evidence to support the ground for deportation. This respondent is a 24-year-old male, native of Korea, citizen of China, who was admitted to the Territory of Hawaii at Honolulu on May 26, 1924 for permanent residence. He came to continental United States on September 1, 1947 and has resided in this country to the present time. Warrant of arrest was served in this proceeding on October 31, 1950 and hearing began on November 22, 1950, and was concluded April 19, 1951 in California.

[fol. 6] The Hearing Officer has summarized the evidence in this case and it is unnecessary to repeat the facts here. He has found that the uncontroverted testimony of two witnesses establishes that this alien was a member of the Communist Party of the United States in Honolulu, Territory of Hawaii, during 1945 and 1946; and that during such period he attended Communist Party meetings as a respresentative and as a delegate.

The Assistant Commissioner has carefully reviewed the case and in his memorandum and decision of August 1, 1951 has answered many of the pertinent questions raised by counsel. He has found that the evidence which shows that this respondent was a member of the Communist Party of the United States during 1945 and 1946 is substantial and reliable and fully sustains the ground for deportation. The respondent has, on advice of counsel, refused to state whether he was a member of the Communist Party of the United States after his entry to this country.

We have carefully reviewed the pertinent evidence in this case and we find that there is substantial and reliable evidence which has been uncontroverted and which shows that this respondent was a member of the Communist Party of the United States during 1945 and 1946. We further find that he was an active member of such Party and that his membership in the Communist Party was voluntary.

Concerning the constitutional questions urged by counsel, it is noted that on March 10, 1952 the Supreme Court of the [fol. 7] United States, in the case of *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (72 S. Ct. 512), held that the United

States may constitutionally deport a legally resident alien because of membership in the Communist Party of the United States. Furthermore, in an expressed opinion in *Martinez* v. *Neelly*, 197 F. 2d 462 (C.C.A. 7, 1952), the Court stated that membership in the Communist Party present or past, is as a matter of law ground for deportation.

Concerning the request of counsel for rehearing in the case to receive testimony of witnesses to supplement the evidence in the nature of depositions or sworn statements taken about December 18, 1950 in Honolulu, Hawaii in order that counsel may cross-examine such witnesses, it is noted that appropriate notice was given to counsel for the respondent on December 7, 1950, apprizing him that such statements or depositions would be taken and giving the respondent an opportunity to be present in person or through counsel and cross-examine the dependent. It appears that an appearance was waived by counsel for the alien (Ex. 5). Counsel now contends that the alien is not financially able to send a representative to Honolulu to appear for him, and was not able to do so in November or December of 1950. There is no provision of law or regulations which requires that the United States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the State of California and depositions were taken in Hawaii. [fol. 8] In view of the foregoing discussion it must be concluded that counsel's points of argument are without merit; that the record clearly sustains the ground for deportation; and that the appeal should be dismissed.

Order: It is ordered that the appeal from the decision of the Assistant Commissioner on August 1, 1951 be and the same is hereby dismissed.

(S.) Thos. G. Fennimone, Chairman.

[fol. 9] UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

ORDER THAT ALIEN BE DEPORTED—August 1, 1951

File: A-3611569—Los Angeles (1600-61258). Appeal 15.
In re: David Hyun.
In Deportation Proceedings.
In Behalf of Respondent: Milton S. Tyre, Esquire, 650 South Grand Ave., Los Angeles 14, California.

Charges:

Warrant: Act of October 16, 1918, as amended. After entry, alien who was member of the Communist Party of the United States.
Lodged: None.
Application: Termination of proceedings.
Detention Status: Released under $5000 bond.
Discussion: Upon consideration of the entire record, including the exceptions taken, the recommended order of the officer conducting the hearing is hereby adopted. Counsel for respondent has submitted a bill of exceptions. Therein he takes exception to the finding of fact that respondent was a member of the Communist Party of the United States, and to the conclusion of law that respondent is deportable under the Act of October 16, 1918, as amended. The deportability of respondent stems from these provisions of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950 (Public Law 831—[fol. 10] 81st Congress; Chapter 1024—2nd Session; H. R. 9490):

> "SEC. 4(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in . . . section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry, into the United States."

Section 1(2) of said Act reads, in pertinent part:

> "(2) Aliens who, at any time, shall be or shall have been members of any of the following classes: . . . (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . . ."

Thus, the Act of October 16, 1918, as amended, inter alia, subjects to deportation any alien who was, at any time after his entry into this country, a member of the Communist Party of the United States.

The record in this case estabilshes that respondent is an alien, who entered the United States on May 26, 1924, and that he was a member of the Communist Party of the United States in 1945 and 1946. The foregoing facts render re- [fol. 11] spondent deportable under the Act of October 16, 1918, as amended. Counsel questions the constitutionality of the Act of October 16, 1918, as amended, and the Act of February 5, 1917, as amended. Determination of the constitutionality of a statute enacted by the Congress is beyond the reach of this Service. That is a function restricted to the judicial branch of the government. *Panitz v. District of Columbia*, 112 F. (2d) 29, 42 (C. A. D. C., 1940). *Todd v. Securities and Exchange Commission*, 137 F. (2d) 475, 478 (C. A. 6, 1943).

It is contended by counsel that respondent's constitutional rights were violated, in that these proceedings were held while respondent was kept in custody by this Service. The record discloses that these proceedings were held over a period extending from November 22, 1950 to April 19, 1951. We find that respondent was afforded ample opportunity to prepare a defense to the charge placed against him by the government.

It is further contended by counsel that the hearing officer was biased and prejudiced. Counsel points to the fact that the hearing officer, being, in the employ of this Service, was subject to its direction, instruction, and control, and therefore unable to render an unbiased and impartial decision.

In one respect, a federal judge and a hearing officer stand on the same footing,—both are, and have been, in the employ of the federal government. It would be an absurdity to [fol. 12] disqualify a federal judge from presiding at a pro-

ceeding solely because that proceeding had been instituted by the federal government. The hearing officer is in an analogous position.

The conduct of the hearing officer is bound by the provisions of 8 C. F. R. 151.2(b), effective September 14, 1950 (published 15 F. R. 6169, September 14, 1950), which states, in part:

> "(b) *Hearing officer; general duties.* The hearing officer shall conduct a fair and impartial hearing. He shall use his independent judgment in rendering his decision and shall not perform any duties inconsistent with the duties and responsibilities of an adjudicating officer . . ."

In the instant case, there is no evidence that the hearing officer consulted any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; or that the hearing officer engages in the performance of investigative or prosecuting functions; or that the hearing officer is responsible to or subject to the supervision or direction of any officer or employee of this Service engaged in the performance of investigative or prosecuting functions.

Further, there is no evidence of personal bias or prejudice on the part of the hearing officer in favor of the Government or against respondent. Accordingly, we find that it was proper and legal for the hearing officer to have presided at these proceedings.

[fol. 13] Counsel next protests that the hearing officer permitted depositions to be taken in Hawaii, without providing transportation to that place for the respondent or counsel. The law requires no such provision.

Objection is also made to the admissibility in evidence of the contents of these depositions. We have carefully examined the contents of the depositions in question, and we find that deponents Uesugi and Izuka testified that they had seen respondent in attendance at meetings restricted to members of the Communist Party of the United States. According to their testimony, these meetings occurred dur-

ing 1945 and 1946. We find that this evidence is substantial and reliable, and that it fully sustains an order of deportation. When respondent was asked during these proceedings whether he was a member of the Communist Party of the United States, he replied that he refused to answer that question on the ground that it might tend to incriminate him.

Counsel takes exception to the refusal of the hearing officer to grant motion of counsel to reopen the hearing for the purpose of introducing evidence concerning the nature of the Communist Party of the United States. The nature of said Party is not in issue in these proceedings and we find that the hearing officer properly denied this motion.

Order: It is ordered that the alien be deported from the United States, pursuant to law, on the charge stated in the warrant of arrest.

[fol. 14] (S.) A. C. Devaney, Assistant Commissioner, Adjudications Division.

AG; cam.
AG J. P. S.

[fol. 15] Before the Board of Immigration Appeals

Oral Argument—March 12, 1952

In re: David Hyun

File: 3611569.

Board: Messrs. Finucane, Nettleton and Ludwig.

Heard: Isidore Englander, Attorney, 205 East 42nd Street, New York, N. Y.

Request: That the case be sent back so as to produce competent testimony, not by deposition.

Attorney: I have been practicing now law for 24 years, and immigration law for quite a number of years, as you know, but what makes the profession of the law interesting is the fact that you always come across something new. In this case I have only looked at the record today for the first time, and something new has been added. This man was arrested in California, in Los Angeles. He was one of those who was held for a considerable period of time on Terminal Island, in detention. At the time of his arrest

in October 1950 he was served with a warrant in which the charge against him was under the Internal Security Act, Section 22, having been a member of the Communist Party. The only evidence against him in the case consisted of testimony taken by deposition, of witnesses in Honolulu. It is true that the alien, who at that time was in custody [for. 16] throughout the hearings, was told that he can have someone present there; and he was told either at that time or at the time when the depositions were taken, that if he wanted to, and was willing to pay the expense of himself and I presume of at least two guards to accompany him from California to Honolulu, he might have been present at Honolulu where the depositions were taken. Obviously he had not the money to do that, or to hire an attorney in Honolulu. He did have an attorney in California. Depositions were supposedly taken in Honolulu. Now, in my civil practice I have seen depositions; that happens very often where witnesses are out of town; but usually it is provided that the expense of both sides is paid for 50-50 or some other arrangements made. No provision for payment here was made. But more than that, in every deposition that I have seen taken, whether state or Federal depositions, it always provides that the testimony is to be taken by someone impartial and not connected with either side of the litigation. The depositions here were taken before an examining officer and a hearing officer, of the Immigration Service: Why they needed an examining officer I don't know, unless he had nothing else to do that particular day, because he just sat there like a dummy. There were no objections made. Everything that the examining officer asked went into the record—leading questions, hearsay, everything is in there.

[fol. 17] It wouldn't do any good afterwards to say you could have made objections at the time when the depositions were introduced. If you look at the record—and I looked through it a little hurriedly—I found not a single objection. Objections were made by the attorney at the hearing in California when the depositions came back, and not a single objection was sustained.

But furthermore, and more importantly, the right of cross-examination was denied. I submit to you that that

right can never be denied. The Government sought to deport this alien who has a legal residence in the United States; it is incumbent upon the Government to produce testimony where the alien and his counsel would have the right to cross-examine the witnesses. The core of the charge,—the main thing—was evidence taken in Honolulu.

Chairman: Hasn't the procedure such as adopted here been approved in a prior deportation proceeding?

Attorney: Not to my knowledge.

Chairman: In the review and habeas corpus?

Attorney: Not to my knowledge, frankly.

Chairman: I have a recollection with reference to the habeas corpus proceeding.

Attorney: I have *never* heard of anything like this before. This is the first time I have heard of it. And I submit to you, assuming that is so, here the respondent was in [fol. 18] custody, and clearly the right of consultation and the right to cross-examine was not available to him.

Mr. Ludwig: Did he have an attorney or any representative at the time the deposition was taken in Honolulu?

Attorney: *No*, sir: Nobody represented him there.

Mr. Nettleton: Was this statement made before two immigration officers?—one presiding and the other questioning?

Attorney: That's right.

Chairman: Your application is what, specifically?

Attorney: My application is that the case be sent back for a hearing so as to produce competent testimony, not by deposition.

Chairman: You want to bring the witness from Honolulu to San Francisco?

Attorney: That's correct: It's a burden upon the Government. I don't think due process can be done away with because it might be somewhat expensive to the Government. That was the argument in the case in which Mr. Justice Jackson just refused to listen to that. The fact it is going to be an expense is not enough to take away due process.

Of course I am urging all the other arguments about the Administrative Procedure Act and the constitutional questions.

Chairman: All right, sir.

[fol. 19] BEFORE THE IMMIGRATION AND NATURALIZATION SERVICE

EXCEPTIONS TO HEARING OFFICER'S DECISION—Dated April 24, 1951

L. A. File No. 1600-61258

Central Office File No. A-3611569

In the Matter of the Deportation of DAVID HYUN

The respondent hereby files his Exceptions to the Hearing Officer's Decision in the above entitled matter, dated April 24, 1951. These Exceptions are filed pursuant to Title 8, Chapter I, and particularly part 151.5(c), and pursuant to the letter of the District Director dated May 22, 1951 granting to the close of business on May 25, 1951 within which to submit these Exceptions. In support of these Exceptions, respondent respectfully represents as follows:

I

Respondent excepts to Finding of Fact No. (3) on the ground that there is insufficient evidence as a matter of law to support said finding.

II

Respondent excepts to the Conclusion of Law on the ground that there is insufficient evidence as a matter of law to support said conclusion.

III

Respondent excepts to the recommended Order on the ground that the evidence in the case does not support said [fol. 20] recommendation.

IV

The Act of October 16, 1918, as amended, and Section 19 of the Immigration Act of 1917 are unconstitutional as applied to this respondent in that, among other reasons,

said Acts violate the First and Fifth Amendments to the United States Constitution.

V

The procedure followed in this case violated the respondent's constitutional rights in the following respects:

A. The entire course of this proceeding was conducted at a time while the respondent was imprisoned and detained by the Los Angeles District Director of the Service without right to post bail, which imprisonment and detention were without proper foundation or basis in law or in fact.

B. The hearing Officer was biased and prejudiced, as evidenced by

1. He was at all times during this proceeding a direct employee of the Service and subject to its direction, instruction and control and therefore unable to render unbiased and impartial recommendations.

2. Over strenuous objections of the respondent, the Hearing Officer allowed depositions on behalf of the Government to be taken in Honolulu, Territory of Hawaii, without provision being made for the transportation to Hawaii of the respondent or his counsel.

[fol. 21] 3. He allowed the depositions to be introduced into evidence despite objections of respondent.

4. He refused to sustain a single objection to any of the questions propounded in the depositions or to grant a single motion of the respondent to strike certain of the answers of the said depositions.

5. He refused to grant a continuance for a reasonable period for the sole and exclusive purpose of offering evidence as to the nature of the Communist Party of the United States, despite a motion made and supported by affidavit in accordance with the rules and regulations of the Service.

Respondent is preparing a detailed argument and brief outlining the particular errors of law committed in the course of this proceeding and the particulars wherein it is indicated that the evidence is insufficient to support the Findings of Fact or Conclusions of Law. When this argument and brief have been prepared, respondent will ask

leave to file such document as a supplement to these Exceptions.

Dated: May 25, 1951.

(S.) Milton S. Tyre, Attorney for Respondent.

(Endorsed) Received May 25, 1951.

[fol. 22] Immigration and Naturalization Service

Order Denying Motion to Reopen Hearing—April 25, 1951

Los Angeles, California.

File No. 1600-61258 (Los Angeles), A3 611 569

In re: David Hyun

In Deportation Proceedings.

In Behalf of Respondent: Mr. Milton S. Tyre, Attorney at Law, 650 South Grand Avenue, Los Angeles 13, California.

Charges:

Warrant: The Act of October 16, 1918, as amended, in that he has been, after entry, a member of the following class set forth in Section 1(2)(c) of said Act; an alien who was a member of the Communist Party of the United States.

Application: Motion by Counsel to reopen hearing in deportation proceedings.

Detention Status: Detained at: Terminal Island Detention Station, U. S. Immigration & Naturalization Service Terminal Island, California.

Discussion: Hearing in deportation proceedings in the case of the above named alien was completed on April 19, 1951. During the hearing the charge contained in the warrant of arrest was the sole charge at issue, no other charges have been lodged.

[fol. 23] In Counsel's Motion, he requests that the hearing be reopened for the purpose of permitting the respond-

ent to offer evidence concerning the character, aims, objects and purposes of the Communist Party of the United States of America and alleges no other purpose.

The charge contained in the warrant of arrest, and there being no other charges, the character, aims, objects and purposes of the Communist Party of the United States of America are not at issue. Accordingly, the Motion to reopen the hearing for this purpose will be denied.

Order: The Motion to reopen the hearing is denied.

(S.) John B. Bartos, Hearing Officer.

[fol. 24] Before the Immigration and Naturalization Service

L. A. File No. 1600-61258

Central Office File No. A-3611569

In the Matter of the Deportation of David Hyun

Motion to Reopen Record and Offer of Proof

Respondent David Hyun in the above entitled matter hereby moves the Hearing Officer to reopen the record in this case for the purpose of permitting testimony concerning the character, aims, objects and purposes of the Communist Party of the United States of America. In support of this motion respondent alleges as follows:

I

At the last hearing in this matter on April 19, 1951 respondent through his counsel moved for a short continuance, the exact time to be determined in the discretion of the Hearing Officer, for the purpose of permitting the respondent to offer evidence concerning the character, aims, objects and purposes of the Communist Party of the United States of America. The motion of the respondent was denied, and shortly thereafter on April 19, 1951 the hearing was closed.

II

The respondent moves to reopen this record solely for the purpose of permitting evidence as aforesaid. If the [fol. 25] record is reopened for such purpose, respondent will prove through the testimony of Gus Hall, National Secretary of the Communist Party of the United States, and/or other qualified witnesses the character, aims, objects and purposes of the Communist Party of the United States of America. If this record is reopened Gus Hall and/or other qualified witnesses will testify to the same extent and in the same manner, subject to cross-examination, as to the allegations set forth in the Amended Answer of the Communist Party of the United States of America in the matter of J. Howard McGrath, Attorney General of the United States, Petitioner, vs. The Communist Party of the United States of America, Respondent, before the Subversive Activities Control Board, Case No. 51-101, which Amended Answer was verified by Gus Hall as National Secretary of the Communist Party of the United States, and which Amended Answer is now on file in the said matter before said Board. A true and correct copy of said Amended Answer containing the testimony which Gus Hall and/or other qualified witnesses will offer in the case now pending before this Hearing Officer in the matter of David Hyun has been verified by Gus Hall before a notary public in the State of New York and is attached to this motion and by this reference incorporated as a part of this motion as though fully set forth hereat.

Wherefore, respondent prays that this motion to reopen the record herein may be granted so as to permit the testi- [fol. 26] mony of Gus Hall and/or other qualified witnesses as aforesaid.

Dated: April 24, 1951.

(S.) Milton S. Tyre, Attorney for Respondent David Hyun.

(Endorsed:) Received April 25, 1951.

[fol. 27] EXHIBIT TO MOTION

IN THE SUBVERSIVE ACTIVITIES CONTROL BOARD

No. 51-101

J. HOWARD MCGRATH, Attorney General of the United States, Petitioner,

v.

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, Respondent

AMENDED ANSWER

Answering the petition, the respondent states as follows:

I

A. Respondent denies the authority of the persons purporting to act as members of the Subversive Activities Control Board to conduct this proceeding, for the reason that they do not hold lawful office, and no lawfully constituted Board is now in existence.

B. Respondent files this amended answer and participates in this proceeding under protest against the denial by the Subversive Activities Control Act of 1950 (herein called the Act) and by this proceeding of fundamental civil and political rights guaranteed to it by the Constitution and Bill of Rights.

C. Respondent reaffirms and reasserts all of the *b*rounds for dismissing the petition, quashing the proceeding and striking the petition set forth in its motions heretofore [fol. 28] filed in this proceeding.

II

A. Respondent denies the first unnumbered paragraph of the petition, and further denies that it is a Communist action organization as defined by Section 3(3) of the Act.

B. Respondent states that it was organized in 1919 and has been in existence continuously since that date, and states that its organizational structure and the relations between the national organization and its state, county, city

and other units, are as defined and prescribed in its National Constitution.

C. Respondent denies the first five unlettered paragraphs of Section II of the petition. Respondent refers to Part III of this answer for a true and correct statement of its purposes, the principles on which its policies are based and the manner in which they are adopted and carried out. Respondent denies paragraphs (A) to (I) of Section II of the petition, except to the extent that said paragraphs may be construed to allege the facts that: (1) it is affiliated with the Communist International prior to November, 1940; (2) it disaffiliated from the Communist International in November, 1940; (3) the Communist International was dissolved in June, 1943; (4) Prior to October 16, 1943, there was an organization in the United States known as the Young Communist League, which prior to December 22, 1940, was affiliated with the Young Communist Interna-[fol. 29] tional; (5) at a Convention of the Communist Party in May, 1944, the Party reorganized itself as the Communist Political Association; (6) in July, 1945, at a Convention of the Communist Political Association, the Communist Party was reconstituted; (7) in 1929 there was a disagreement within the Communist Party; and (8) certain books and other publications, including the books and publications described in paragraph (E) of Section II, have been sold and distributed in the United States. Respondent denies the relevancy of any of the foregoing facts to any issue to be determined in this proceeding.

D. Respondent states that it has adopted and advocated views and policies on public questions of concern to the American people, and particularly the working people. Respondent denies the false, distorted and tendentious statements of Section III of the petition relating to its views and policies, their character and purpose, and further denies the relevancy of the allegations of Section III to any issue to be determined in this proceeding. Respondent refers to Part III of this answer for a true and correct statement of the character of the views and policies of the Party and the purpose of their adoption and advocacy.

F. Respondent denies that it receives financial aid from or at the direction of the Government of the Soviet Union,

the Communist Party of the Soviet Union, the Communist International, or the Communist Information Bureau. Respondent denies paragraphs A, B and E of Section IV [fol. 30] of the petition. Respondent denies the relevancy of the allegations of Section IV of the petition to any issue to be determined in this proceeding.

F. Respondent denies Section V of the petition. Respondent states that during the period of its affiliation with the Communist International, members and representatives of the Party attended and participated in meetings of its congresses and certain of its committees; that members of the respondent have from time to time visited foreign countries, including the Soviet Union; that in the past certain members of the respondent studied in the Soviet Union. Respondent denies the relevancy of any of the foregoing facts to any issue to be determined in this proceeding.

G. Respondent denies Section VI, of the petition.

H. Respondent denies Section VII of the petition, and refers to Part III of this answer for a further answer thereto.

I. Respondent denies Section VIII of the petition, and refers to Part III of this answer for a further answer thereto.

III

A

The Attorney General's petition misrepresents and completely distorts the Communist Party's peace policies. It adopts the supposed "Congressional findings of fact as set forth in Section 2" of the Act.

The Communist Party declares that these so-called findings are gross falsehoods, a re-hash of the Hitler-Goebbels [fol. 31] Big Lie under cover of which the Nazis seized power in Germany and plunged the world into war.

The language of the Act paraphrases the words of Hitler, who declared that:

> "The Communist Party was a section of a political movement which had its headquarters abroad and was directed from abroad . . .
>
> "We look on Bolshevism as a world peril for which

there must be no toleration . . . Communism is the most frightful barbarism of all times." (*Nazi Conspiracy and Aggression*, U. S. Gov't Printing Office, Washington, D. C., 1946, col. 1, p. 246.)

In 1820, similar slanders were spread against the United States itself by Count Metternich, architect of the reactionary European war pact known as the Holy Alliance. According to Metternich:

"These United States . . . have cast blame and scorn on the institutions of Europe most worthy of respect . . . fostering revolutions wherever they show themselves . . . they lend new strength to the apostles of sedition, and reanimate the courage of every conspirator." Dexter Perkins, *Hands Off! A History of the Monroe Doctrine*, Boston, 1941, pp. 56-57.

(1) The Communist Party has consistently defended world peace and the national security of the United States. The false and distorted characterization of its views and [fol. 32] policies on international questions to Section III of the Attorney-General's petition are wholly irrelevant to the charge of foreign domination.

The petition cites a series of instances in which the policies advanced by the Communist Party were in agreement or at variance with the foreign policy of particular administrations. The Communist Party opposed the foreign policies of the Harding, Coolidge and Hoover Administrations. So did many non-Communist Americans. The Communist Party supported the main anti-Axis and peace policies of the Roosevelt Administration, whole freely exercising its right to criticize or oppose certain departures from these policies which weakened the struggle for peace. It did not stand alone, either in its support or in its opposition.

The Communist Party has indeed opposed the whole war policy pursued by the bipartisan coalition in power since Roosevelt's death. But it is wholly irrelevant to the false charge of foreign domination and control that it opposed such policies as the Truman Doctrine, the Marshall Plan, the North Atlantic Past, or the U. S. Government's brazen

interference in the Italian elections of 1948 which is belatedly admitted in the Attorney-General's petition. Equally irrelevant is its opposition to the re-arming and re-Nazification of western Germany, to the appeasement of fascist Spain, to military support of the puppets Bao-Dai and Chiang Kai-sek, to the interventionist war in Korea, and to acts of aggression against the Chinese People's Republic. [fol. 33] Millions of non-Comunist Americans have joined with it in opposing some or all aspects of the Truman Administration war policies. The Communist Party has been at all times in the vanguard of this growing popular opposition to Wall Street's war aims, and has been at all times consistent in its advocacy of a peace policy based on American-Soviet cooperation.

(2) The Communist Party has supported all genuine peace proposals, regardless of where or by whom they were initiated. This fact is also irrelevant to the false charge of foreign domination and control.

The Communist Party insists that any proposal for the settlement of international differences must be judged solely by the extent to which it serves the intersts of the American people—which coincide with those of all peoples who aspire to lasting peace.

It has consistently supported the peace proposals advanced by the Soviet Union for the reason that the peace policies of the Soviet Union have consistently met this supreme test. The U. S. S. R. is a socialist country, ruled by the working people. It is a land free of international cartellists, monopoly profiteers, merchants of death and others who stand to profit in any way from aggression, conquest or war. Free from the spectre of recurrent economic crisis and mass unemployment, the Soviet Union has a limitless [fol. 34] home market for its expanding peace-time production and thus has no reason to embark on imperialist adventures abroad. Its cornerstone is the equality and friendship of peoples; and it has destroyed the social and economic roots of war by abolishing class and national oppression.

The Communist Party has not hesitated to support various peace proposals initiated by capitalist states. It has supported such policies whether put forward by President Roosevelt before and during World War II, by President

Truman at Potsdam, or more recently by Premier Nehru of India and the Arab-Asian bloc in the United Nations.

The Communist Party has also supported a number of important peace campaigns initiated by people's movements in the United States and elsewhere. A notable example is the World Peace Appeal for outlawing atomic weapons through international agreement and inspection. Other examples (significantly omitted from the petition) are its support for the similar appeal made by the International Red Cross, and the peace proposals advanced by the American Quakers.

(3) It is irrelevant to examine the extent to which the position of the communist party on one or more issues of foreign policy coincides with that of the Soviet Union or any other nation.

The purpose of the Communist Party in advocating its peace proposals cannot be established by determining who initiated, supported, or opposed them. The only pertinent [fol. 35] test is: does the policy advocated by the Communist Party conform to the true interests of the American people by promoting the cause of world peace?

Every example of the peace policy of the Communist Party set forth in Section III of the petition—despite the Attorney-General's attempt to falsify and distort them illustrates the consistency of its devotion to the cause of peace, and hence to our country and people. Every cited example exposes the Attorney General's sinsister effort to make it appear *that the United States is Wall Street*, and the venal interests of the big bankers and international cartellists, those of the nation.

The Communist Party declares that the American people are the nation. The enemies of the nation and people are the handful of Wall Street monopolists who lead a world-wide conspiracy to subordinate human life and liberty to their vested interests and greed for profit.

The Communists—and many non-Communists—served our country well by opposing the Wall Street Monopolists who in the 1930's financed and supported Hitler, condoned the rape of Manchuria, Ethiopia and Czecho-Slovakia, and up to the day of Pearl Harbor sold oil and scrap iron to Japan. Those Americans—Communists and non-Commun-

ists—were true patriots who opposed the embargo against Republican Spain, fought in the Abraham Lincoln Brigade, and otherwise defended peace and democracy against the facist Franco and his masters Hitler and Mussolini.

[fol. 36] The Communist Party, and many others, opposed the Wall Street cartellists who maintained treasonous relations with their Nazi partners throughout World War II. Communists and all true defenders of the United States opposed the big monopolist corporations that refused to convert their plants to war production, until bribed with huge cost-plus contracts and excess profits.

It was the American workers, including the leaders and members of the Communist Party, who selflessly supported the U. S. anti-facist World War II effort on the battlefront and on the home front.

The Communist Party today calls on the American people to reverse the policy that frees the Nazi war criminals, and the murderers of American G. I.'s at Malmedy. It opposes the restoration to power of Alfred Krupp, the re-arming of western Germany and Japan, the rebuilding of the German and Japanese trusts under the new management of Wall Street.

The Communists are joined by millions in opposing and condemning these betrayals of the World War II dead, and the aims for which 15,000 members of the Party served in the armed forces of the United States.

The foreign policies which the petition accuses the Party of opposing have now brought the world to the brink of a terrible atomic war. They have already cost over 50,000 American casualties. They have brought on the United [fol. 37] States the hatred and moral condemnation of all peace-loving humanity. These are the policies that launched General Ridgeway's "Operation Killer," the policies of war on the colored peoples of Asia, of Mass murder, of genocide.

These same imperialist policies are saddling the American people with crushing taxes, driving down the workers' living standards through unrestricted monopoly profiteering and rigid wage freezes. These policies are fostering unprecedented brutality against the Negro people, and extending the Dixiecrat system of lynch justice to our North-

ern cities and to the Negro G. I.'s in Korea. These policies are corrupting our youth, putting 18 year-olds in uniform and training them to become what General Hershey called a "generation of killers."

These policies mock our country's democratic traditions, and are fast destroying both the Constitution of the United States and the Charter of the United Nations.

In whole or in part, the policies which the Communist Party has opposed are opposed by a majority of the American people. The attempt, through this proceeding, to outlaw the Communist Party is therefore also an attempt to outlaw all opposition to a third world war, all united action in defense of world peace.

To this end, the petition seeks to establish that the Communist Party, and any other group[t] that does not submit to control by the Wall Street monopolists, is "foreign dominated." The Communist Party freely admits its independ-[fol. 38] ence from and opposition to this war-minded financial oligarchy. This proves only that it is "dominated" by concern for the welfare of the workers and common people of the United States.

(4) The Attorney General's allegation as to what patriotism means to the leaders and members of the Communist Party is wholly false and malicious.

The Communist Party rejects the chauvinist slogan, "My country right or wrong." With this slogan, and in the name of German "patriotism," Hitler dragged the German people to national dishonor and national disaster, and forced them to support the Axis war against humanity.

The Communist Party subscribes to the slogan of Carl Schurz: "My country, right or wrong; when right to be kept right; when wrong to be set right."

This concept of patriotism is in the great American tradition of Abraham Lincoln, Frederick Douglass, Ralph Waldo Emerson, Henry David Thoreau and others who actively opposed the Polk Administration's annexationist war against Mexico. It is in the tradition of Carl Schurz, Mark Twain, Finley Peter Dunne and others who opposed the unjust Spanish-American war and the annexation of Puerto Rico and the Philippines. It is in the honored tradition of

Eugene Debs, who was jailed for his opposition to the first World War.

Today true patriotism expresses itself in united struggles for a foreign policy that will keep our country secure in a world at peace; advance the economic and social wel- [fol. 39] fare of our people by devoting America's vast resources and labor power to peace-time production and construction; defend and extend the democratic rights of all Americans, Negro and white, by defending the right of all peoples everywhere to take their own path to social progress.

In this spirit of true patriotism, the Communist Party seeks to unite all like-minded Americans—regardless of their political beliefs—in a common struggle to curb the would-be war-makers, and to reconstruct Roosevelt's "Grand Design" for world peace by establishing friendly relations and trade with the Soviet Union, the Chinese People's Republic and the People's Democracies of Eastern Europe.

It is beyond dispute that today world peace must be based on agreement between the United States and the Soviet Union. By stigmatizing all agreement with the Soviet Union, and making hostility toward it the test of "patriotism", the Attorney-General reveals that the real purpose of this proceeding is to outlaw the advocacy of peace and to prepare for an American-made war of aggression and conquest.

B

The Communist Party has been an American working class political party for over thirty years. Its record is one of defense of the rights and welfare of the working class, the Negro people, and the interests of the American nation.

The true purposes and character of the Communist Party are set forth in its Constitution, which was most recently [fol. 40] reviewed and re-adopted by the 15th National Convention in December, 1950. In its preamble the Constitution states:

> "The Communist Party of the United States is a political party of the American working class, basing

itself upon the principles of scientific socialism, Marxism-Leninism . . .

"The Communist Party upholds the achievements of American democracy and defends the United States Constitution and its Bill of Rights against its reactionary enemies who would destroy democracy and popular liberties. It uncompromisingly fights against imperialism and colonial oppression, against racial, national and religious discrimination, against Jim-Crowism, anti-Semitism and all forms of chauvinism. "The Communist Party struggles for the complete destruction of fascism and for a durable peace . . .

"The Communist Party holds as a basic principle that there is an identity of interest which serves as a common bond uniting the workers of all lands. It recognizes further that the true national interests of our country and the cause of peace and progress require the solidarity of all freedom-loving peoples and the continued and ever closer cooperation of the United Nations.

"The Communist Party recognizes that the final abolition of exploitation and oppression, of economic [fol. 41] crisis and unemployment, of reaction and war, will be achieved only by the socialist reorganization of society—by the common ownership and operation of the national economy under a government of the people led by the working class. "The Communist Party, therefore, educates the working class, in the course of its day-by-day struggles, for its historic mission, the establishment of Socialism.

"Socialism, the highest form of democracy, will guarantee the full realization of the right to life, liberty and the pursuit of happiness, and will turn the achievements of labor, science and culture to the use and enjoyment of all men and women."

The Communist Party is "dominated and controlled" only by its members and the leaders they elect. Article IV, Sections 1 and 2 declare:

"Every member of the Party who is in good standing has not only the right but the responsibility to par-

ticipate in the making of its policies and in the election of its leading committees, officers and delegates in the manner provided for in this Constitution.

"After a thorough discussion in any club, committee, or Convention, decisions are made by a majority vote."

Article VII, Section 1 and 7, further states:

"The highest authority of the Party is the National Convention. . . ."

[fol. 42] "Between National Conventions, the National committee is the highest authority of the Party."

(1) The roots of the Communist Party lie deep in American soil. Section I of the petition deliberately conceals the Party's historic origins, in an effort to give credence to the false charge of foreign domination.

Socialist thought, primitive socialist experiments, and socialist political organizations appeared in this country long before the existence of the Soviet Union or the Communist Party. Karl Marx once observed that, "Socialism and Communism did not originate in Germany, but in England, France and *North America.*"

Nearly one hundred years ago, and sixty years before the Socialist Revolution of 1917, the first Communist club in America was organized. Many of Marx' works were first published in this country. American Marxists supported the founding of the Republic- party, and backed Lincoln's 1860 compaign for the presidency.

American followers of Marx, who called themselves Communists, enlisted in the Union Army. Joseph Wedemeyer and August Willich rose to the rank of Brigadier General. Among other well-known Communists of the time were Fritz Jacoby, a leader of the New York Communist Club who was killed at Fredericksburg, and Robert Rosa, a Major in the Union army.

American Marxists were active in the early trade unions. They helped form the first National Labor Union—the fore-[fol. 43] runner of the American Federation of Labor, whose head, William Sylvis, subscribed to the principles of the International Workingmen's Association—the First Communist International.

In 1881, American Marxists played a leading role in the organization of the American Federation of Labor, and

their socialist views were reflected in the preamble to its first Constitution.

In 1876 the American Marxists organized as a national political party—the Socialist Labor Party. In 1900, the Socialist Party was established.

In the decade prior to the Russian Revolution of 1917, a strong left trend developed in the American Socialist Party led by Eugene Debs. This group finally broke with the opportunist leaders of the Socialist party, who had betrayed the principles of socialism and abandoned the struggle against the imperialist war of 1914-1918.

The victory of the first socialist revolution, and the establishment of a socialist state in the land formerly ruled by the Czars, was an historic event which naturally made a deep impression on workers all over the world, including those Americans who had long held socialist ideas and now saw their socialist dream become a reality. In 1919 these left forces in the Socialist party founded the Communist Party. Its first general secretary was Charles E. Ruthenberg, who had been imprisoned with Eugene Debs as a result of his peace activities in 1918.

[fol. 44] The Communist Party's chairman, William Z. Foster, was an active participant in these socialist movements, and in the struggles of the trade unions where his leadership of the 1919 steel strike made labor history. Elizabeth Gurley Flynn, a member of the Communist Party National Committee, and many of its charter or veteran members came to the Communist Party deeply imbued with socialist thought and bringing with them a rich experience of the class struggle in this country. These Communist leaders symbolize the continuity of the Communist Party history, and are living refutation of the Attorney General's specious contention that the Party is foreign in origin and alien to America.

(2) The Communist Party is a party of a new type. Far from being a "conspiracy" it is a political party of the working class.

The Communist Party is the political party of the American working class, and therefore a party of a new type. It does not conform to the structure and practices of the Democratic and Republican parties because the aims and

aspirations of the working class do not conform to the aims and aspirations of the imperialist exp*oli*ters.

The Republican and Democratic parties are the servants of the mon-polists, and seek to perpetuate the system of private ownership under which the few profit from the labor of the many. The Communist Party is the party of Social- [fol. 45] ism, and strives to convince the workers that it is their historic task to establish the common ownership of the nation's resources and manage its productive capacity for the benefit of all the people.

Unlike the Republican and Democratic parties, the Communist Party is free from corruption. It has never had a Teapot Dome, deep-freeze, or mink coat scandal—a Pendergast machine, or a Frank Costello in its ranks.

Unlike the Republic- and Democratic parties, the Communist Party does not deceive the voters and make election promises to be forgotten after the votes are in.

Unlike the Republican and Democratic parties, the Communist Party does not offer the people fake "alternatives", while keeping them prisoners of the two-party system owned and run by Wall Street.

The Communist Party is the vanguard party of the American working class. In fulfillment of its vanguard role, it led the long struggle to organize the workers in the mass production industries, and to establish industrial unions. In the 1930's the decisive sections of the American working class responded to the Communist Party's vanguard leadership. When with the assistance of hundreds of Communists the Congress of Industrial Organizations cracked the open shop in the basic industries.

During the years of Hoover's Great Depression, the Communist Party led the successful fight for government unem- [fol. 46] ployment relief and insurance.

The Communist Party is the vanguard Party of the Negro people in their struggle for national liberation and equality. It actively opposes the ideology of white supremacy and works for the alliance of the working-class with the Negro liberation struggle. It resolutely combats any expression of white chauvinism in its own ranks.

The Communist Party initiated and led the campaign that defeated the Scottsboro frame-up. It leads the fight against

lynch justice, jim-crow discrimination and segregation, and the national opporession of the Negro people who are the majority in the Black Belt in the South. It fights for an F. E. P. C. and poll-tax repeal. It bent every effort to save the Martinsville Martyrs and is fighting resolutelu for the lives of Willie McGee and the Trenton Six.

The Communist Party is the party of a new type because it is a party that promotes Negro and white unity, and the united action of all groups and individuals prepared to struggle against the threat of fascism and war.

The Communist Party is the party of a new type because it engages in and helps lead all the economic struggles of the workers and common people, actively supports the wage demands and strikes of the trade unions, participates in popular movements for rent and price controls, for schools, housing and medical care. It concerns itself with the economic and social conditions of the youth, women, and small [fol. 47] farmers. It fights against the wage-freeze, increased taxes and other effects of the huge war budget upon those least able to pay. It has led the struggle to preserve the Bill of Rights, against the reactionary drive of the warmongers to convert our country into a policy state, and to degrade our culture into an American version of Nazism.

The Communist Party is the party of peace, social progress and *Socialism*. Unlike the Republican and Democratic parties, the Communist Party seeks to educate the workers in the course of their day-to-day struggles, to promote labor unity and the united action of all peace-loving and democratic forces.

The Communist Party participates in national, state and city election campaigns. It organizes public discussion of its local and national Convention resolutions, and of the reports made to its National Committee. It uses every means available to make its policies known to the American people, and to convince them of the validity of its position on all public questions.

(3) The Communist Party promotes working class internationalism. International labor solidarity and the cooperation of the world peace forces have benefitted our own as well as other countries. The Communist Party's par-

ticipation in international movements is totally irrelevant to the charge of foreign domination and control.

The Communist Party fully subscribes to and practices [fol. 48] the view of Abraham Lincoln who said:

> "The stongest bond of human sympathy, outside of the family relation, should be one uniting all working people, of all nations and tongues and kindreds."

The Attorney General's false charges were also answered in 1869 by William Sylvis. Noting that the program adopted at the Baltimore Convention of the National Labor Union was strikingly similar to that drawn up by Karl Marx at the Geneva Congress of the First International, Sylvis wrote to Marx: "Capital is the same tyrant in all parts of the world. Therefore, I say our cause is a common one."

Internationalism is a cherished American tradition. At its birth in 1776 our country had the fraternal assistance of Lafayette, Kosciusko and Steuben. These participants in our Revolution were not French, Polish or German "foreign agents." France did not cast out Lafayette an "American agent," although he returned honored with American citizenship conferred on himself and his descendants.

The Union cause in our Civil War of 1861-65 owed much to the support of the British working class—which saved us from British intervention in behalf of the slave-owning insurrectionists. Yet the British workers were not "American agents", but true British patriots.

The struggle for an eight-hour day, initiated in the United States, became an international struggle in which the workers of Europe and America joined forces to better [fol. 49] their living and working conditions.

The historic international struggles for the freedom of Dreyfus in France, for the freedom of Tom Monney, Sacco and Vanzetti, the Scottsboro boys in America, and many other similar labor defense struggles were "Dominated" only by the universal concern of the peoples to save the victims of class injustice. Beginning with the Reichstag Fire trial, and the frame-up of the great Communist leader

George Dimitroff, Nazi Atrocities gave rise to a tremendous wave of such international struggles.

Among the working class internationalism arose in the earliest days of the trade unions in every country. They found it essential in order to protect themselves against the breaking of strikes by the employers, through importation of workers from other countries, who were kept ignorant of the existence of the strike.

The forms of working class internationalism vary. At one time, the Communist Party was affiliated with the Communist International, and participated in its congresses and political campaigns around specific issues. Those relations were terminated in 1940, and the Communist International itself dissolved in 1943. Since 1940, the Communist Party has had no international affiliation of any kind—although it follows with interest the experiences of other Communist parties, reads theirs journals, and on appropriate occasions sends or receives fraternal greetings.

[fol. 50] International cooperation has often included financial assistance from workers of any countries to workers of other countries. The Communist Party raises its finances from its membership and from public appeals and campaigns. Its annual financial drive is conducted publicly. For many years the Communist Party gave financial assistance to the victims of fascism, to the resistance movements in various fascist countries, and to anti-fascist refugees. Such practices have by no means been limited only to Communist or working class movements in this country. The long fight for the Irish Republic rec-ived financial support from individuals and groups in many countries. From the days of the Czarist pogroms to those of the Nazi terror, the Jewish people of Europe have received financial aid from Jews and non-Jews throughout America and the world. American Zionists have for years contributed financially to the support of their movement in other countries.

Participation in an international working class organization in no way implies any foreign "disciplinary power." It cannot and does not imply robot-like "discipline". Participation in a working-class international organization means to consult together on the basis of the different types

of working-class experience in each country, to assist one another in the scientific examination of such specific conditions and experiences, and to place the combined thinking at the service of the working-class of one's own country for their consideration.

[fol. 51] The Attorney General's false charges in this connection have an obvious and sinister purpose, as the petition reveals in its citation of the support given by the Communist Party to the mighty and growing world peace movement.

For the threat of an atomic world war has aroused the world's peoples to an altogether new appreciation of the value and power of international co-operation in defense of peace. The vast majority of the human race has formed a mighty and growing movement of struggle for peace. No nation on earth could, if it would, impose a robot-like "discipline" on these hundreds of millions of war-weary human beings. Nor can any agency of government prevent the American people from associating themselves with their fellow men and women in other lands, who are bound together by the universal and supreme will to prevent a third world war.

C

The Communist party has resolutely defended its constitutional rights and legal status. It functions openly as a legal political party. It maintains public national, state and section headquarters which are listed in the telephone directory. Its views are constantly released to the general press, and published in daily, weekly and monthly papers and journals which circulate through the mails and are for sale on newsstands. Books by Communist leaders are sold in bookstores everywhere. The Marxist classics are on the shelves of public and university libraries all over the coun-[fol. 52] try. National, state, and section organizations of the Party issue millions of leaflets every year—and give them the widest possible circulation.

Despite the Communist Party's fight to defend its constitutional rights, and despite the wide support the American people have given this struggle, many restrictions have recently been placed on the Party's effort to present its program to the people. In a number of states the Com-

munist Party has been deprived of its right to a place on the ballot. Almost everywhere it is denied the right to buy newspaper space for paid advertisements, or radio time. F. B. I. Director J. Edgar Hoover inadvertently admitted that the Party's right to secure meeting halls and assemble publicly has been drastically curtailed, when he told a congressional committee recently that the number of public meetings held under Communist auspices has decreased.

In similar defiance of the Constitution, the Communist Party and its members have been subjected to slander and persecution by a host of federal and local agencies, and singled out for prosecution by this Act and various state acts and local ordinances.

Communists are being robbed of their right to earn a living, as well as of their right to speak and assemble. Americans alleged to be Communists, or to hold views shared by Communists, or to have relatives or friends alleged to associate with Communists suffer similar economic and social disadvantage.

[fol. 53] Long prison terms are meted out to men and women simply because they are Communists, Communist sympathizers, or under suspicion of having Communist ideas. Persons under suspicion of association with Communists are harrassed by legislative committees, threatened with violence, and in some instances have been the victims of physical assault. Americans of foreign birth, who have lived here since infancy, are threatened with deportation and the concentration camp on the ground of such alleged sympathies or associations.

Under these conditions, Communists have in some instances been obliged to safeguard their liberty and their jobs by exercising their right to keep their political views to themselves.

Such necessary precautions were forced on the American workers throughout the long years when their efforts to organize trade unions in the basic industries were met by blacklist, discharge, strike-breaking violence, and a whole system of legalized and extra-legal terror.

Such necessary precautions were also common among the pre-Civil War Abolitionists. What the Attorney General calls "clandestine practices" were adopted by the heroic

Negro leaders Harriet Tubman and Sojourner Truth, and by the Quakers and others who maintained stations on the underground railway in the days of the Fugitive Slave Law.

In the face of these facts the Attorney General now cynically claims that the precautions forced upon Com- [fol. 54] munists as a result of their persecution by the Department of Justice and other public and private bodies have been voluntarily adopted by the Communist Party to conceal its purposes. His real complaint is that despite persecution, the Party is still able to express its views publicly, and to initiate or support broad united front actions on vital issues of the day. *The purpose of this Act and of this proceeding is therefore to outlaw the Communist Party*, and remove it from all access to the market place of ideas. Their purpose is to prevent the Communists from rallying wide popular support for such policies as that adopted by the Party's National Convention in December, 1950:

> "It is the sacred duty of our Party, of every worker, of every person who loves his home and country, to prevent a third world war with all its ghastly consequences. Such a war would only spell death, destruction, untold misery and starvation, not only for other peoples throughout the world, but for our own people. There is no greater patriotic duty than to prevent a third world war; for to save peace is to save America itself from destruction."

D

Throughout the 32 years of its existence, the Communist Party has been guided by the working class social science first expounded a century ago by Karl Marx and Frederick Engels, and later enriched and developed by V. I. Lenin, [fol. 55] Joseph Stalin, and their collaborators. This science was evolved from an objective analysis of the concrete economic and social conditions existing in various historic periods and in various parts of the world, and from the generalized experience of the world working class. Its chief exponents, their followers and collaborators, have analyzed the scientific laws of social change and progress, the laws

of the development of capitalist production and of the irreconcilable conflicts inherent in the capitalist social system.

This science has enabled the Communist Party to guide the working people of the United States in effective struggle for immediate improvements in their living and working conditions, and to prepare them for future struggles looking toward the socialist reorganization of society.

The Communist Party naturally studies and learns from the foremost exponents of Marxism-Leninism, those whose theory and practice have been tested in experience and verified by history. But, in applying this science to the solution of the problems of the American working class and people, the Communist Party relies above all on its own leadership, on the experience of its members and other advanced workers, and upon its analysis of American conditions and the needs and desires of the American people.

Sharing a common scientific outlook, the Communist Parties of all countries naturally express similar views [fol. 56] on current questions. This is particularly true when the questions are international in scope and related to the world wide struggle for peace.

The Attorney General's false charge that this similarity of views constitutes a "conspiracy" is as ridiculous as to charge that similarity of views in any other science betokens some kind of conspiracy. Such a position would return humanity to the Dark Ages, negate all science, and ban all scientific inquiry and interchange. Yet the Attorney General degrades our country's level of intelligence by making the charge that the publication in newspapers and working class scientific journals of speeches and articles by Communist leaders represent the submission of "reports" by "foreign agents" to their supposed "superiors."

(1) In its advocacy of social change, social progress, and the eventual socialist reorganization of society the Communist Party gives its allegiance only to the sovereign power that resides in the American people.

The Communist Party declares that no fundamental social change can be brought about in our country, except by the will and united action of a majority of the American people. Least of all can the socialist reorganization of

society be imported, or imposed from without. The common ownership of the means of production cannot be established by any minority group, and only when a majority of the people accept the leadership of the American working class and its Communist vanguard.

[fol. 57] The history of the United States has been marked by many great struggles for social change and progress. Victory in these struggles has been possible only when the majority of the American people made a decisive choice and threw their weight into the balance. The outcome of today's struggles and of those of the future, will also be decided by the majority.

This is true for our country and for all countries. This generalization of past experience is emphasized in all the literature of Marxism-Leninism, from the century-old *Communist Manifesto* through all the current documents of the Communist Party of the United States.

This fundamental principle was emphasized by the world's leading Marxist, Joseph Stalin, when on March 1, 1936, he told the American publisher Roy Howard:

> "'Export of revolution' in nonsense. Each country if it wishes, will make its own revolution, and if it does not wish to, there will be no revolution. Thus, for example, our country wanted to make a revolution and made it."

(2) Reaction has always leveled the "foreign agent" charge against movements for social progress, in our own and other countries. The fact that the Communist Party hails and supports the socialist achievements of the peoples of the Soviet Union and the lands of People's Democracy, and the national liberation victories and struggles of the [fol. 58] colonial peoples, is wholly irrelevant to the false charge of "foreign domination."

Both before and during his presidency, Thomas Jefferson was denounced as an "agent of France" by the American Tories. The Federalists declared that the Democratic Clubs which Jefferson organized were "part of a vast secret and subversive international body organized by the bloody French Jocobins, and subsidized by Paris gold." These and similar false charges were used as pretexts for passing

the Alien and Sedition Acts of 1798—the hated political progenitors of the Subversive Activities Control Act of 1950.

The same false charges were leveled against the early American trade unions. In sentencing the New York tailors in the conspiracy trial of 1836, Judge Edwards declared: "Trade unions are of foreign origin and I am led to believe mainly upheld by foreigners."

The Abolitionists, the woman suffrage movement, advocacy of a graduated income tax and proportional representation—even free public education—were in their time denounced as "foreign" inspired. Unemployment insurance and social security, first advanced by the Communist Party in the 1930's, were opposed as a Moscow plot to wreck the American economy.

Today American imperialism opposes the peoples' movements for social change throughout the world as "internal aggression" organized and promoted by the Soviet Union—and therefore to be resisted by the force and violence of [fol. 59] atomic world war organized by the United States. This proceeding, and the Act under which it is brought, confirm that such a view can only lead to the destruction of all liberty in the United States itself.

The Act is planned and intended to outlaw the Communist Party. But it is not aimed at the Communists alone. Its broad target is the Constitution, the labor movement and the Negro people, and the growing people's movement of resistance to the Wall Street drive toward fascism and a third world war.

That is why it was opposed in Congress by broad forces which included the American Federation of Labor, the Congress of Industrial Organizations, the Railroad Brotherhoods, and many independent unions; the National Association for the Advancement of Colored People, the American Jewish Congress, the American Civil Liberties Union, Americans for Democratics Action, the American Veterans Committee, the National Farmers Union, the Women's International League for Peace and Freedom, the Association of the Bar of the City of New York, the National Lawyers Guild, Governor Bonner of Montana, Governor Johnson of Colorado; the noted constitutional authorities Professor Zechariah Chafee of Harvard, Professor Fowler

Harper of Yale, and Professor Emeritus William Gorham Rice of Wisconsin; such distinguished citizens as Chancellor Robert M. Hutchins of the University of Chicago and Councilman Stanley M. Isaacs of New York; religious groups like the Episcopal League for Social Action and [fol. 60] the Friends (Quakers) Committee on National Legislation; Bishop Francis Bass of Grand Rapids, Michigan and many others. More than 20 major newspapers, and thousands of local groups, condemned this measure.

The nationwide movement which opposed the Act at the time of its passage has grown and will continue to grow. For this war measure was pushed through Congress at a time when the Korean war hysteria was at fever pitch, and before broad sections of the American people had learned from experience that it is an unjust and unnecessary war entailing heavy sacrifice and threatening our country and the world with atomic catastrophe.

The Communist Party reaffirms its faith that the American people will build an invincible united front of resistance to those who are driving our nation toward fascism and a third world war.

We confidently predict that the Act will be repudiated, as the Alien and Sedition Acts and the Fugitive Slave Act were nullified by the popular will.

We reaffirm our allegiance to the American working class which gave birth to the Communist Party, to the American people and the nation whose interests we have served and will continue to serve under any and all conditions.

We unqualifiedly deny the Attorney General's slanders, and assert that the Communist Party and Americans of all political affiliation have the right and the duty to organize [fol. 61] in defense of peace and the Bill of Rights.

Whatever may be the decision of this illegally constituted Board, we have no doubt that the American workers and common people—Negro and white—will follow the precept of Thomas Jefferson and join their forces to guarantee that "we shall see the reign of the witches pass over, and the people recovering their true right."

The Communist Party of the United States,
by —— ——.

Verification

STATE OF NEW YORK,
County of New York, ss:

Gus Hall, being duly sworn, deposes and says: I am the National Secretary of the Communist Party of the United States and I subscribed to the foregoing amended answer on its behalf. I have read the foregoing amended answer and know the contents thereof. The matters alleged therein are based on information and belief, and I believe them to be true.

(S.) Gus Hall.

Subscribed and sworn to before me this 31 day of March, 1951. (S.) Carl Brodsky, Notary Public, State of New Work, No. 31-0428950. Qualified in New York County. Certificates filed in the following offices: County Clerk, New York County. Register: New York County. Commission Expires March 30, 1953.

[fol. 62] (Affidavit of Service by Mail—1013a, C.C.P.)

STATE OF CALIFORNIA,
County of Los Angeles, ss.

Bess Shapiro being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 650 South Grand Avenue, Los Angeles 17, California that on the 24th day of April, 1951, affiant served the within Motion to Reopen Record and Offer of Proof on the Immigration and Naturalization Service in said action, by placing a true copy thereof in an envolep addressed to the Examining Officer at the office address of said Examining Officer as follows:

Sidney Broffman, Esquire
Examining Officer
Immigration and Naturalization Service,
117 West 9th Street, Los Angeles, Calif.,

and by then sealing said envelope and depositing the same with postage thereon duly prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the Examining Officer by and for whom said service is made.

That there is delivery service by the United States mail at the place so addressed and/or there is a regular communication by mail between the place of mailing and the place so addressed.

(s) Bess Shapiro

Subscribed and sworn to before me this 24th day of April, 1951.

(s) Milton S. Tyre

(SEAL) Notary Public in and for the County of Los Angeles, State of California.

[fol. 63] Immigration and Naturalization Service

DECISION OF THE HEARING OFFICER

In re

DAVID HYUN

IN DEPORTATION PROCEEDINGS—April 24, 1951

Charges

WARRANT: The Act of October 16, 1918, as amended, in that he has been after entry a member of the following class set forth in Section 1 (2)(C) of said Act: An alien who was a member of the Communist Party of the United States.

LODGED: None.

I. DISCUSSION OF THE EVIDENCE—DEPORTABILITY

The respondent testified that he was born on January 3, 1917, in Seoul, Korea, and is in possession of a passport which shows him to be a citizen of China. This passport shows his birthplace as Kirin, Manchuria, and was issued at the Chinese Consulate General at Honolulu, T. H. on August 21, 1947. The respondent was admitted into the United States for permanent residence at Honolulu, Ter-[fol. 64] ritory of Hawaii, on May 26, 1924, and at that

time the record shows him to have been a citizen of China and gives his place of birth as Seoul, Korea. He resided continuously in the Hawaiian Islands until he came to the mainland of the United States when he was landed at Los Angeles, California, on September 1, 1947. When questioned as to membership in the Communist Party of the United States the respondent declined to answer the questions on the ground that such answers might tend to incriminate him, claiming the privilege under the Fifth Amendment to the Constitution of the United States and further claimed the privilege of remaining mute or declining to answer on the ground that it violated his rights under the First Amendment to the Constitution of the United States.

Depositions in this case were taken at Honolulu, T.H. on December 18, 1950, from four persons. Counsel was notified of the date and place the depositions were to be taken and was advised that the respondent could be represented by counsel at those proceedings. The respondent was not represented by counsel when the depositions were taken.

Of the depositions taken from the four persons, only the depositions of two of those persons are pertinent and relevant to the issue in this case. They are the depositions of DONALD T. UESUGI and ICHIRO IZUKA.

The depon*d*ent, Donald T. Uesugi, was born on November 28, 1915, in Hanamalu, Kauai, in the Territo*t*y of Hawaii, [fol. 65] and has lived in the Territory of Hawaii all of his life. This deponent joined the Communist Party in the latter part of 1945 or the early part of 1946 and remained a member of that organization until the latter part of 1948. This depon*d*ent stated that he belonged to the Makiki cell of the Communist Party in Honolulu, and later belonged to the Punchbowl cell. While a member of the Makiki cell he was the treasurer of that group and collected the dues.

This witness identified the respondent as DAVID HYUN from the photograph as it appears on the Chinese passport of David Hyun and stated that he became acquainted with David Hyun about 1945 in connection with deponent's membership in the Communist Party.

The deponent UISUGI testified that he had attended meetings, closed meetings of the Communist Party, at the home of one CHARLIE FUJIMOTO on Kaia Street in Honolulu and that David Hyun attended some of these meetings. He had seen David Hyun attending meetings of the Makiki cell of the Communist Party on two or three occasions and again had seen him attending meetings of the Punchbowl cell about two or three times. This witness is somewhat indefinite as to the activities of the Communist Party but he is definite as to his own membership in the Communist Party and that the meetings of the Communist Party where he saw David Hyun were meetings that were closed to persons who were not members of the Communist Party and that David Hyun took part in these meetings as a [fol. 66] member of the Communist Party.

The next deponent, ICHIRO IZUKA, was born on June 5, 1911, at Hanapepe, Kauai, and has resided in the Hawaiian Islands all of his life except for a brief period of residence on the mainland.

The deponent Izuka testified that he resided in Honolulu, Territory of Hawaii, from 1942 until 1947, and that he was a member of the Communist Party from 1938 until it disbanded about 1941, then he rejoined the Communist Party when it was reactivated in 1945, and resigned from the Communist Party in October of 1946. This deponent was educated into the characteristics of the Communist Party not only in Hawaii but attended a training school of Communist Party members at 121 Haight Street in San Francisco, California.

This deponent identified David Hyun, the respondent, as a person that he had known as a member of the Communist Party and describes the set-up in Honolulu of the Communist Party at that time during 1945 and 1946. He states that during that time he definitely knew that David Hyun belonged to the Kaimuki Branch of the Communist Party and later at an executive board meeting of the Communist Party in the Territory of Hawaii he met David Hyun at one board meeting when David Hyun was representing the Punchbowl group of the Communist Party. Further, this witness places David Hyun as a representative of the Communist Party at at least three executive

board meetings of the Communist Party where no persons other than members of the Communist Party were allowed [fol. 67] to attend. This witness was also acquainted with David Hyun outside of the Communist Party as well as knowing him as a member of the Communist Party and a delegate representing the Punchbowl group of the Communist Party at the executive meetings of the Communist Party. The witness is definite in his knowledge, and the testimony of the witnesses Uesugi and Izuka have not been controverted. Accordingly it must be found that the charge contained in the warrant of arrest is sustained.

II. Findings of Fact—Deportability.

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native of Korea and a citizen of China;

(2) That the respondent entered the United States at Honolulu, Territory of Hawaii, on May 26, 1924, and was admitted for permanent residence;

(3) That the respondent was a member of the Communist Party of the United States in Honolulu, Territory of Hawaii, during 1945 and 1946.

III. Conclusion of Law—Deportability.

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under the Act of October 16, 1918, as amended, and Section 19 of the Immigration Act of 1917, the respondent is subject to deportation on the [fol. 68] ground that he has been after entry a member of the following class set forth in Section 1(2)(C) of said Act of October 16, 1918, as amended: An alien who was a member of the Communist Party of the United States.

IV. Other Factors.

The parents of the respondent are living in the United States and have been admitted to the United States for permanent residence. No other information was developed

as to the family of the respondent. There are no other factors than have been previously discussed.

F. Recommended Order.

It is recommended that the alien be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

(S.) John B. Bartos, Hearing Officer.

Los Angeles, California.

[fol. 69] Immigration and Naturalization Service

TRANSCRIPT OF HEARING OF NOVEMBER 22, 1950

DEPORTATION PROCEEDINGS

Place of Hearing: Los Angeles, California

IN THE CASE OF DAVID HYUN

PERSONS PRESENT:

John B. Bartos, Hearing Officer
Sidney Broffman, Examining Officer
Helen C. Sanderson, Stenographer
Milton S. Tyre, Alien's Counsel
Attorney at Law,
650 S. Grand Ave.,
Los Angeles 13, Calif.
(Telephone: TRinity 2181)
David Hyun, Respondent

File No. A3 611 569

D.O. File 1600-61258

(Form G-28) filed and accepted.)

Hearing Officer to Counsel:

Q. Are you ready to proceed at this time, Mr. Tyre?
A. Yes, sir, but we have some formal matters however, that we wish to take up first.

Hearing Officer to Examining Officer:

Q. Are you ready to proceed, Mr. Broffman?
A. I am.

Hearing Officer to Respondent:

Q. Will you please stand and raise your right hand?

[fol. 70] By Counsel:

There is a preliminary motion I want to make before we proceed, if I may.

By Hearing Officer:

The counsel will be given an opportunity to make his motion, either orally or in writing, at the proper time.

To the Respondent:

Q. Will you please stand and raise your right hand?

By Counsel:

Sir, may I straighten out this matter. My motion is in the nature of a motion for a continuance. I would presume it would be at the outset of the hearing. I have already made it by the way, orally, to the Acting Chief Hearing Officer when I telephoned him day before yesterday. He said he had no authority to grant it at that time, but that I should renew it at this time. This is the reason why I am renewing it.

By Hearing Officer:

The counsel's motion will be entertained either orally or in writing at the proper time after the hearing has been opened. We are now opening the hearing. I will give you an opportunity.

By Counsel:

All right.

To the Respondent:

Q. Please stand and raise your right hand. Do you [fol. 71] solemnly swear that your testimony in this pro-

ceeding shall be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

Q. What is your name?

A. David Hyun.

Q. I offer for your inspection through your council the original warrant of arrrst Nos. 1600-61258 and A3 611 569 issued on October 31, 1950 by the District Director of the United States Immigration and Naturalization Service at Los Angeles, California for the arrest of David Hyun. This warrant has been executed to show that it was served upon David Hyun at Los Angeles, California on October 31, 1950. Are you the person named in this warrant, and were you so served?

By Counsel:

I will stipulate that he was served on the date mentioned in the warrant and is the person named in the warrant. However, as a condition of the stipulation, I will also ask Mr. Broffman to stipulate that at the time he was served the respondent, David Hyun, was in the custody of the District Director of the Immigration and Naturalization Service, and was served while so in custody at the Federal Building at about 2:45 P.M.

By Examining Officer:

I presume that to be the fact. I have no personal knowl- [fol. 72] edge regarding the circumstances of his being taken into custody, and so on and so forth. I believe it true that he was in custody on the date the warrant was served upon him, and I believe they had a court hearing on a petition for a writ on that day. Does that answer your question, sir?

By Counsel:

Yes, sir.

Hearing Officer to Respondent:

Q. In this warrant of arrest it is charged that David Hyun who entered the United States at Honolulu, Territory

of Hawaii, on May 24, 1924, has been found in the United States in violation of the immigration laws thereof, and is subject to being taken into custody and deported pursuant to the following provision of law and for the following reason, to wit: The Act of October 16, 1918, as amended, in that he has been after entry a member of the following class set forth in Section 1(2)(c) of said Act, an alien who was a member of the Communist Party of the United States. Do you understand the nature of this charge?

By Counsel:

Mr. Hearing Officer, please, I believe it is well at this time to make the motion for continuance without getting into any discussion regarding these matters.

By Hearing Officer:

That will be taken into consideration at the proper time. I want to know whether or not the respondent understands [fol. 73] the nature of the charge?

By Counsel:

Look, he has to obviously consult with me on this particular problem, Mr. Hearing Officer. This goes to the very substance of the charge itself. This is the very reason why I want the continuance is to go into the whole legal problems involved on this particular charge, which is much different than the charges made against him in the prior warrant for arrest. This is the problem we have at hand and the reason why I want the continuance.

By Hearing Officer:

The substance of the charge is that the respondent has been found unlawfully in the United States and subject to deportation for the reason that he has been found to have been a member of the Communist Party of the United States after his entry. Now, the question is, does he understand that charge?

Hearing Officer to Respondent:

Q. Do you understand that charge, Mr. Hyun?

By Counsel:

I do not know how he can answer the question.

By Respondent:

I accept my counsel's statement that I am unable to answer this question because we have not had sufficient time to study the charge properly.

By Hearing Officer:

[fol. 74] Q. Does counsel understand the charge?

By Counsel:

Mr. Hearing Officer, I don't intend, believe me, to be obstinate, but I can't say Yes and I can't say No, because that is the reason why I wanted more time. I want to study this charge, the nature of the evidence that can be produced against the alien to prove the charge, or the evidence to meet the Government evidence.

By Hearing Officer:

The counsel will be given ample opportunity.

To the Respondent:

Q. You are further informed that this warrant of arrest recites that you shall be taken into custody and shall be granted a hearing to show cause why you should not be deported in conformity with law. That is the purpose of this hearing. Do you understand?

By Counsel:

That is clear enough.

By Hearing Officer:

You are informed that a copy of the warrant of arrest is now made a part of this proceeding as Exhibit 1 and will be considered in arriving at a decision in your case. Do you understand?

By Respondent:

I understand.

Hearing Officer to Counsel:

[fol. 75] Counsel has indicated that he wishes to make a motion in this case, and at this time, his motion either orally or in writing will be entertained.

By Counsel:

The motion is for a reasonable continuance for the purpose of preparing properly for this type of a hearing. It is made in honesty, sincerity and good faith. The respondent, as the record will show, has been in the custody of the Immigration Department continuously since October 21st. There have been numerous hearings and proceedings almost continually since immediately following October 21st in the United States District Court before Judge Ben Harrison, for the purpose of attempting to obtain a writ of habeas corpus to release the respondent pending these deportation proceedings. The Hearing Officer may be aware of the fact that there have been a large number of such re-arrests through the country and there are a large number of petitions for writs of habeas corpus filed in the various United States District Courts throughout the United States, and the vast majority of such writs have been granted. The writs in these cases not granted is a matter of law. Immediately thereafter, we filed an appeal with the United States Court of Appeals in the Ninth Circuit. Briefs have been filed in connection both with the original case in the District Court and with the Court of Appeals. Numerous, almost too many to remember, appearances have been made, briefs have been filed, research been done, in connection with this particular matter of just releasing [fol. 76] the respondent on bail pending these deportation proceedings. I think the Hearing Officer can appreciate the time that is required of counsel. If perhaps this was the only case that I had in my office I would have had time to prepare for this, but I simply have not had an opportunity, and I mean that, to even study the warrant, let alone the law. The first time I had any sort of an opportunity to

study this case was on Monday of this week, the day before yesterday, when the District Director allowed the respondent and several other respondents in a similar position to be brought up from Terminal Island where they have been almost continually since October 21st, so that I could interview the respondent.

By Hearing Officer:

Before counsel goes any further, I wish counsel to understand that the District Director of the Immigration and Naturalization Service has not informed me of any agreement made with counsel, of any matters whatever that he has taken up with counsel, or of any background of the case. Counsel may proceed with his motion, and if he has lengthy argument, he is requested to submit his argument in writing.

By Counsel:

I can't do that, but I will summarize briefly what I had in mind. The basis of this, Mr. Hearing Officer, is the lack of time that I have had.

By Hearing Officer:

[fol. 77] I understand that the counsel states that he has had little time to study the law under which the warrant was issued, and that he has had little time to confer with the respondent. However, his notice of appearance in this case is dated on August 9, 1949. Therefore, he must be aware of some of the ramifications of the charges.

By Counsel:

Of course, I am not pretending that I am not. This is only a matter that has come up since the new warrant of arrest was served on October 31st.

By Hearing Officer:

Counsel may continue his motion only briefly.

By Counsel:

I am simply stating the time that has been required, not through my own doing at all but by the Immigration De-

partment itself. Everyone can expect counsel to make every possible effort to obtain the release of a prisoner from jail, especially when his family is in dire need of his services and his income. I have made those efforts so far without success. We are now before the U. S. Court of Appeals on the appeal of Judge Ben Harrison's denial of the writ of habeas corpus. Hearing Officer has stated that he has had no transmittal from the District Director concerning these proceedings, and at this time I shall make reference to the case that I refer to in the District Court as No. 12505.

By Hearing Officer:

[fol. 78] You may introduce that as an exhibit in evidence as we go into the hearing.

By Examining Officer:

This would be part of the hearing itself. The Government will stipulate that he has been attempting to obtain the release of the respondent since the respondent has been taken into custody.

By Hearing Officer:

But, I also see here on the warrant that the person named in the warrant is to be continued in custody pending determination of deportability. Also, no Government evidence has been presented here which would warrant a continuance for time in order that the counsel may assemble evidence to overcome the presentation of the Government evidence. In view of that, counsel's motion is denied.

By Counsel:

Of course, I have not furnished evidence as yet, you asked me to proceed.

By Hearing Officer:

Well, you were submittting argument in support of your motion.

By Counsel:

By having stated that I want the continuance. I am asking you only for a reasonable continuance. I am not asking to be put off three or four months, I am asking to be put off only a couple of weeks. Of course, there are holidays intervening, but notwithstanding that, I am asking that this be put off for a couple of weeks until I have [fol. 79] a chance to examine the law. This is the new McCarran Act; the law about which a great deal of discussion has been held by persons in high government office as to its constitutionality. And, I think that grave doubts have been raised by persons of much more academic knowledge than I, and it seems as though it is only reasonable that I should have some opportunity to raise, Mr. Hearing Officer, the doubts which I have, which I cannot put in form of an argument. I cannot prepare for the case properly without having an opportunity to do the necessary research and the evidence which may or *not may* be adduced in support or against the law as discovered through my research.

By Hearing Officer:

Counsel will be given ample opportunity to establish evidence, and ample opportunity to make further motion for continuance. However, the motion for the continuance at this time is denied.

By Counsel:

I cannot proceed at this time, Mr. Hearing Officer. Mr. Hearing Officer is very kind in stating there will be an opportunity later to ask for a continuance, but I don't know yet how serious the matters may be that I have to raise. They may have to be raised at the very outset of the hearing, and if the respondent is to be put on the witness stand I am positive these are matters which I must study before I can proceed at all. I am unprepared to proceed at this time, and I renew again my motion for continuance.

[fol. 80] By Hearing Officer:

Counsel's motion is denied. The Examining Officer will proceed.

By Examining Officer:

I would like to call the respondent as a witness.

Examining Officer to Respondent:

Q. What is your full, true and correct name?
A. I am unprepared to answer this.
Q. Is it to be understood than that your response will be the same to all questions?

By Counsel:

A. Only at this time. We just want an opportunity to prepare for this hearing. Something any trial court and any court in this land will grant.

By Examining Officer:

Well, there is no use arguing with me. I have no control over the granting or denial of a continuance.

By Hearing Officer:

The Examining Officer will proceed. The respondent is in the witness chair.

By Examining Officer:

Well, in order to save time, I would like to know whether I am going to get the same response to all questions.

By Counsel:

I would think so.

By Examining Officer:

Q. Well, can we get a direct response from the respond-
[fol. 81] ent in that matter? I just want to save a lot of time. I wish to only ask the necessary questions.

By Counsel:

The nature of the questions would be the same type of questions that you asked at the last hearing on this matter under the old warrant, would they not? The answers, I

presume, would be the same. But you were going into the very substance of the charge, now.

By Examining Officer:

Well, let's confine it to alienage then—personal history.

By Counsel:

The answers would be the same.

By Hearing Officer:

I would suggest that the Examining Officer ask the questions direct and let the respondent answer if he wishes, or whatever the advice of the counsel may be.

By Examining Officer:

My inquiry was merely for the purpose of saving time here.

Examining Officer to Respondent:

Q. Have you ever used any other names other than that of David Hyun?

A. Since we are unprepared to proceed with the case for that reason I am not prepared to answer any questions.

Hearing Officer to Respondent:

Q. Do you decline to answer the questions "Yes" or "No"?

A. We are unprepared.

[fol. 82] Hearing Officer to Examining Officer:

Proceed Mr. Broffman.

Examining Officer to Respondent:

Q. I now show you a passport which contains a picture thereon. Passport appears to be that of a Chinese passport No. 1191550 in the name of David Hyun, and ask you whether you can identify that passport?

By Hearing Officer:

Let the record show that the passport is presented to respondent through his counsel.

By Respondent:

I decline to answer that question on the previous basis.

By Examining Officer:

I offer the passport into evidence and call the Hearing Officer's attention to the picture thereon and ask him to take notice of the fact that the picture mentioned is that of a good likeness of the respondent.

By Counsel:

I object to the introduction of this exhibit at this time for the reason that there has been no proper foundation laid; I object to it on the further ground and to all further questions, and to the offering of any further testimony whether oral or in writing, on the ground that the motion has been improperly granted and that we are not prepared to proceed; and on the further ground that this entire proceeding is in violation of law in that the warrant of arrest [fol. 83] for the alien was improperly served, improperly issued under the law under which it was received and was unconstitutional as it applied to the respondent.

By Hearing Officer:

Objection is over-ruled. Chinese Passport No. 1191550 in the name of David Hyun born January 3, 1917 at Kirin, Manchuria is now made a part of this record as Exhibit No. 2, and will be considered at arriving at a decision in this case. The Examining Officer will proceed.

By Counsel:

May I have an exception to the Hearing Officer's ruling, and I might further state that new rules and regulations have been issued under the McCarran Act. I think I received those yesterday. I have not even examined them or studied them. I have not had the opportunity to do so; and that is a further reason why I wanted more time.

By Hearing Officer:

The Examining Officer may proceed.

By Examining Officer:

Q. I will now show you Form I-404 relating to certificate of admission of an alien dated August 25, 1949 in the name of David Hyun, and ask you to examine this certificate and state whether or not the facts thereon relate to you to the best of your knowledge and belief.

By Hearing Officer:

Let the record show that the above described document is [fol. 84] presented to the respondent through his counsel.

By Respondent:

A. I decline to answer that question on the previous grounds.

By Counsel:

I return the document to the Examining Officer.

By Examining Officer:

The document is offered into evidence as exhibit next in order.

By Counsel:

I object to the introduction of the document on the grounds previously stated, or the objections to the document previously offered.

By Respondent:

Q. May I consult with my attorney at the present time?
A. (By Examining Officer:) Yes, you may.

By Hearing Officer:

Objection is over-ruled. The Form I-404, Certificate of Admission of Alien, in the name of David Hyun shows his arrival at the mainland of the United States at Los Angeles, California on September 1, 1947. Such document is now made a part of this record as Exhibit No. 3 and will be considered for whatever the information thereon is worth in arriving at a decision in this case.

By Counsel:

May I ask the Hearing Officer what possible foundation there is for accepting that document in evidence in the present state of the record. No one has testified that that [fol. 85] is a proper or authentic or original or duplicate document, whether the facts therein stated are true or believed to be true *ot* the knowledge of the person offering it.

By Hearing Officer:

Counsel has been informed that the respondent here has been found in the United States in violation of law, and in this hearing he is given an opportunity to show cause why he should not be deported on the charge in the warrant of arrest. He has been given an ample opportunity to examine the document and make any statement in connection therewith that he wishes. He has declined to answer the questions.

By Counsel:

To Hearing Officer, please, in this court and in all of the courts in the land of the United States, it is necessary first in any case in the Immigration Department to prove facts like competent material relevant in proper evidence before any type of a case may be heard.

By Hearing Officer:

The Counsel may state his argument in his brief.
The Examining Officer will proceed.

By Counsel:

I would like to reply to the statement made by the Hearing Officer.

By Hearing Officer:

You may make your argument in your brief.
The Examining Officer will proceed.

[fol. 86] By Examining Officer:

I now show you another Form I-404, Certificate of Admission of Alien, issued at Honolulu May 20, 1949 relating

to one David Hyun, and ask you to examine that certificate and state whether or not the facts thereon relate to you to the best of your knowledge and belief?

By Hearing Officer:

Let the record show that the described document is presented to the respondent through his counsel.

By Respondent:

I refuse to answer that question on the previous grounds.

By Counsel:

I object to the introduction of the document referred to in evidence on the grounds previously stated at the introduction of the previous document.

By Hearing Officer:

Counsel's objection is over-ruled. Form I-404, Certificate of Admission of Alien, dated May 20, 1949 at Honolulu, T. H. covering the admission there for permanent residence on May 26, 1924 of David Hyun is now made a part of this record as Exhibit No. 4 and will be considered in arriving at a decision in this case.

The Examining Officer may proceed.

Examining Officer to Respondent:

Q. Of what country are you now a citizen or subject?

A. I refuse to answer the question on the same grounds.

Q. Are you now a member of the Communist Party of the United States?

[fol. 87] By Counsel:

I object to this question and all other questions in connection with this proceeding on the grounds previously stated, and I object to the introduction of the evidence on the grounds previously stated. I object to the hearing preceedings at this time on the further ground that the questions callin*f* for answers would cause the respondent to violate the various provisions of the Federal Constitution.

By Hearing Officer:

Objection is over-ruled.

By Respondent:

I refuse to answer the question, because it may tend to incriminate me, and also on the separate and independent ground that I am unprepared to proceed with the hearing.

Examining Officer to Respondent:

Q. Have you ever been a member of the Communist Party of the United States since your arrival on the mainland in 1947, as indicated by Exhibit 3?

By Counsel:

I object to the question on the same grounds which I previously stated in connection with these proceedings.

By Hearing Officer:

Objection is over-ruled.

By Respondent:

I decline to answer the question on the ground that the answer may tend to incriminate me and also on the separate [fol. 88] and independent ground that I am not prepared to proceed with the hearing at the present time.

Examining Officer to Respondent:

Q. Were you ever a member of the Communist Party of the United States since your arrival in Honolulu in 1924 as indicated by Exhibit 4?

By Counsel:

I object to that question on the grounds stated for the previous question, and on the further ground that it is a previous question not in evidence and is a double question

By Hearing Officer:

Objection is over-ruled.
The Examining Officer will repeat the question.

By Examining Officer to Respondent:

Q. Were you ever a member of the Communist Party of the United States since your arrival at Honolulu in 1924 as indicated on Exhibit 4?

A. (By Counsel) I repeat the same objection which I have already made, and I further object on the grounds that the question has already been asked and remains unanswered.

By Hearing Officer:

Objection is over-ruled.

By Respondent:

I decline to answer the questions on the basis that it may tend to incriminate me, and also on the separate and independent ground that I am not prepared to proceed with [fol. 89] the hearing at the present time.

By Examining Officer:

At this time, I move to take depositions in Honolulu from the following people: Richard C. Kageyama, Easter J. Doyle, Donald Uesugi and Ichiro Izuka.

By Hearing Officer:

The motion of the Examining Officer is taken under consideration and no ruling is made at this time.

The Examining Officer may proceed.

By Examining Officer:

I have no further questions to ask at this time.

By Hearing Officer:

The counsel may proceed.

By Counsel:

Since the Hearing Officer has taken the motion under advisement, do you prefer that I make my objections in writing, or do you prefer that I make them orally at this time?

By Hearing Officer:

Counsel may object to the motion either orally or in writing. The motion is merely taken under advisement that no ruling is made at this time to defer continued hearings for the taking of these depositions. The reason that no ruling on the motion is made is to give counsel an opportunity to go into any matter having a bearing on the issue in this case at this time if he so desires.

The counsel may proceed.

[fol. 90] By Counsel:

I will make my objections orally. On the taking of depositions; (1) on the grounds that I object to any evidence being offered at this time, either in the form of motions or written or oral evidence, for the reason that I have had insufficient time to prepare the case for this hearing; (2) on the grounds that the entire proceeding is in violation of law, in that the warrant of arrest was improperly served——

By Hearing Officer:

Counsel may enlarge on those objections in the written brief. In the interim, his objection to the motion of the Examining Officer is over-ruled, and he may proceed, either to present witnesses at this time, or to question his client. Does counsel wish to have his client take the witness chair, and answer questions propounded by counsel?

By Counsel:

Mr. Hearing Officer, I am in a complete state of confusion. The motion is made to take depositions——

By Hearing Officer:

No ruling has been made on that motion. I am giving you the opportunity to develop any evidence and present any witnesses you wish at this time. Now, it is up to you to state whether you want to do that, or not.

By Counsel:

Q. Well, I have a duty to try and protect the record, Mr. Hearing Officer. I have not finished offering the

[fol. 91] ground for my objection to the Examining Officer's motion. When you stated you may offer the ground in a formal document to be submitted later, and the motion is denied, do I take it from that that there is a provisional ruling, and that you may change that ruling after you have received my written objection to the grounds therefor?

By Hearing Officer:

A. The counsel may enlarge in his brief as to why he thinks that my over-ruling the objection is unlawful or not, in accordance with law. He may submit his argument that way. I do not here decide the case; I merely hear the case; preside at the hearing.

Q. We will have no further argument on that at this time, Mr. Counsel. You are given an opportunity now, if you wish, to present witnesses or elicit information from your client in the manner that you deem best. What do you wish to do?

By Counsel:

A. I want first of all for the record to show that I have not finished making my motion to objections to the taking of the depositions—I have not finished making my objections to Examining Officer's motion for the taking of depositions in Honolulu.

By Hearing Officer: (To Counsel)

Q. The counsel will be given an opportunity to renew his objection at the proper time. In the interim, he may proceed to elicit information from his client, or to present [fol. 92] witnesses in the case if he so desires. What is your pleasure, Mr. Counsel?

A. At this time, I ask the Hearing Officer again, and make it in the form of motion, to defer the further continuance for the purpose of determining the answers to the questions that have not been answered. I am not in position at this time to say whether or not we are ready to proceed. I have not had time to prepare this case.

By Hearing Officer: (To Counsel)

Q. Do you wish to present any witnesses at this time?
A. I do not, because I cannot, for the many reasons that I have already stated.
Q. Do you wish at this time to have your client take the witness chair and question him?
A. No, sir, for the same reason that I am not prepared to proceed at this time with this, or any other witnesses.
Q. I am giving you an opportunity at this time, counsel, to place your client on the stand and question him. Do you wish to do so?
A. Mr. Hearing Officer, your record is preponderantly clear, you have offered me every possible opportunity and I will stipulate at this time to present any evidence that I want.
Q. The thing I am asking you at this time—do you wish at this time to ask your client any questions?
A. I obviously cannot.

By Hearing Officer:

[fol. 93] In view of counsel's answer, it is deemed that he has no questions to ask his client at this time, the respondent, and that he has no witnesses to *witnesses to* present at this time. Mr. Counsel, do you have any documentary evidence that you wish to present at this time?
A. If my motion for continuance is granted, I think I might be prepared to offer a case, but obviously, I am not prepared at this time to do it.

By Hearing Officer:

It is deemed that counsel has no documentary evidence to present at this time that has a bearing on the issue in the case. The motion of the Examining Officer to take depositions from the named persons in Honolulu, Territory of Hawaii, at some future date, is granted.
Counsel will be given notice of the date those witnesses will appear at the Office of the United States Immigration and Naturalization Service in Honolulu, T.H., and at that time, the respondent may be represented there by counsel,

and may present witnesses, and counsel may submit interrogatories, which will be propounded if he so desires on the dates the named witnesses appear in Honolulu.

By Counsel:

I want to state at this time, Mr. Hearing Officer, that this is an arbitrary and an unjust and un-democratic ruling, and one of the most unjust I have had the displeasure of having before any court that purported to deal out justice. [fol. 94] The Examining Officer has merely made a motion to take depositions of certain named persons, has not stated what he expects to obtain in those depositions, has not stated why those depositions cannot be taken here in Los Angeles, why the persons cannot be present, has not offered to have counsel or the respondent or both present at the Government's expense—no reason whatsoever offered. You haven't even listened to my objection to the motion, and yet you grab the motion and overlook my objections, notwithstanding that I haven't even finished making them. You then tell me to go ahead and present them in writing and they will be considered at the proper time, that you have already made your ruling. I take great exception, not only to your ruling, but to the demeanor in which this hearing has been purportedly conducted. I am extremely disappointed.

By Hearing Officer:

The counsel understands that the depositions from the witnesses will be taken on issues having a bearing on the issue in this case.

By Counsel:

The Examining Officer has so just stated. The Hearing Officer may presume certain matters.

By Examining Officer:

I will say for the record that the persons I mentioned are residents in the Territory of Hawaii, and for that reason the motion was made, and it is expected that the testimony will elicit facts relating to respondent's member-

[fol. 95] ship in the Communist Party of the United States as charged in the warrant of arrest.

By Counsel:

Let the record show that that information was requested by the Hearing Officer when he made his ruling.

By Hearing Officer:

The ruling still stands. Counsel may enlarge on his exceptions in his brief.

By Counsel:

Q. To who, may I ask!

By Hearing Officer:

A. It will go to the Commissioner of the United States Immigration and Naturalization Service——

By Counsel:

Who has already stated that he has no authority to change that ruling, pending a final order of deportation! The ruling lies solely and exclusively with you, Mr. Hearing Officer. The responsibility is yours!

I have already had a ruling on this in previous hearings in connection with this case. You make your decision, notwithstanding an order of deportation may fall from that decision, then you say I have my exceptions on a later date. This I consider to be a very un-democratic, a very un-American way of proceeding with what purports to be a judicial holding—a judicial proceeding in and of itself. I consider it a very unjudicial, and I am certain that any court would agree.

[fol. 96] By Hearing Officer:

The hearing is continued, and counsel and the Examining Officer will be notified of the date of the resumed hearing. Adjourned: 11:50 A.M.

I certify that the foregoing is a true and correct transcript of my shorthand notes taken in Book No. 101979 and from

the recording made of the testimony taken in the above case.

(S.) Helen C. Sanderson, Stenographer.

I certify that to the best of my knowledge and belief the foregoing record is a true report of everything that was stated during the course of this hearing, including the oaths administered and the rulings on objections, except statements made off the record.

(S.) John B. Bartos, Hearing Officer.

[fol. 97] Immigration and Naturalization Service

TRANSCRIPT OF HEARING—March 13, 1951

By Hearing Officer

Resumed Hearing in Deportation Proceedings in the Case of David Hyun

Place of Hearing: Los Angeles, California.
Date of Hearing:
Persons Present: John B. Bartos, Hearing Officer; Sidney Broffman, Examining Officer; Norma Williams, Stenographer; Milton S. Tyre, Counsel of record; David Hyun, Respondent.

File Numbers 1600-61258, A3 611 569

(Record by stenographer and dictaphone)

By Hearing Officer:

This hearing was continued on November 22, 1950, on motion of the Examining Officer that depositions be taken in Honolulu, Territory of Hawaii, for evidence pertinent to this case.

Hearing Officer to Examining Officer:

Q. Have those depositions been taken for which this hearing was continued?

A. Yes, they have and they are hereby offered into evidence.

Hearing Officer to Counsel:

Q. Have you had opportunity to read these depositions [fol. 98] Mr. Tyre?

A. Mr. Hearing Officer I have not had sufficient opportunity and I have no objection to the offer if it is being made at this time subject to reservation on my part to any objections I may have either to the deposition itself or the form or substance of any of the questions or answers therein.

Hearing Officer to Counsel:

Have you any motions at this time counsel?

Counsel:

I would like for the purpose I have just stated to move to continue this hearing to a date convenient to the Hearing Officer's calendar and the Examining Officer's calendar, for the purpose of permitting Mr. Hyun to examine the interrogatories in detail and thus prepare cross interrogatories if we deem that necessary or essential, for the further purpose of making specific objection to questions and answers by reference to numbers of those questions and answers. Perhaps we ought to state Mr. Hearing Officer that we have prior to this hearing, Mr. Broffman and you and I, gone over the depositions and numbered each question and answer consecutively.

Hearing Officer:

Yes, the Hearing Officer and Examining Officer and Counsel together in the presence of the respondent and each other have numbered the questions contained in the deposition taken at Honolulu, Territory of Hawaii. Coun-[fol. 99] sel's motion is taken under advisement at this time and no ruling is made.

Hearing Officer to Examining Officer:

Counsel has stated that he has no objection to the offer of the deposition. You may make the offer.

Examining Officer.

Each of the depositions, specifically from Richard M. Kageyama, Donald T. Uesugi, Ichiro Izuka and Easter J. Doyle, taken in Honolulu, on December 18, 1950, before Hearing Officer Milton T. Simmons, is hereby offered into evidence.

Hearing Officer:

The depositions of the four named persons consisting of pages 1 to 41 inclusive, taken at Honolulu, Territory of Hawaii, are now accepted into evidence and made a part of this record as—

EXHIBIT No. 5

all four depositions being considered as one exhibit, and will be considered in arriving at a decision in this case.

Hearing Officer to Respondent:

Q. Have you had yourself ample opportunity to read and study these depositions?

Counsel:

Before that question is answered Mr. Bartos, I think there is a misunderstanding. I said I had no objection to the depositions being offered. It was not intended to infer that I had no objection to their being accepted. I have very strenuous objections. When I said I had no objection to their being offered I meant with the further understanding that I have the reservation at the proper [fol. 100] time to make necessary motion and objections both to the introduction of depositions as a whole as well as to form and substance of the individual questions and answers. I don't want anything misunderstood in this record that I have no objection to the depositions because I strenuously do; that I understood that at the next hearing if one is granted that that would be the proper time for me to offer my objections.

Hearing Officer:

Very well counsel, I will vacate the ruling that the depositions have been accepted as Exhibit No. 5 and allow

counsel opportunity to make objections to their being accepted into evidence.

Counsel: Thank you.

Hearing Officer:

And the depositions will be marked Exhibit No. 5 for identifications purposes only in order to allow counsel opportunity to make his objections and motions.

You may proceed Mr. Broffman.

Examining Officer: I have nothing further at this time.

Hearing Officer: Counsel may proceed.

Counsel:

I have nothing further except to renew my motion for a continuance.

Hearing Officer to Respondent:

Q. Have you had ample opportunity to read these depo-[fol. 101]sitions and confer with your counsel on their contents?

A. No.

Hearing Officer to Counsel:

Q. Mr. Tyre is it your intention or do you believe you will submit cross interrogatories?

A. The purpose of asking for a continuance is to permit Mr. Hyun to examine these interrogatories and confer with him and to find out whether we will submit them and if so which particular interrogatories.

Hearing Officer to Examining Officer:

Q. Have you any objection to a continuance Mr. Broffman?

A. No, not for the purpose stated.

This case is continued until Wednesday, March 28, 1951 which allows counsel 10 business days to assemble his cross interrogatories if he so desires. The dates of March 28 and March 29 are set aside and all persons are notified to be prepared to submit all necessary evidence in this case or the case will be concluded at that time if there is

no valid reason for a further continuance. The hearing will be convened at 10 A.M. March 28, 1951 and all persons are notified to be present at that time without further notice.

Is that clear Mr. Tyre?

Counsel: Yes.

Q. Mr. Broffman? Examining Officer: I understand.

Hearing Officer: Hearing is continued.

[fol. 102] I certify the foregoing to be a true and correct transcript of my shorthand notes (contained in book 02003) and the recording made of the testimony taken in this case.

(S.) Norma Williams, Stenographer.

I certify that to the best of my knowledge and belief, the foregoing record is a true report of everything that was stated during the course of the hearing, including oaths administered, the warnings given to the alien and the witnesses, and rulings on objections, except statements made off the record.

(S.) John B. Bartos, Hearing Officer.

[fol. 103] Immigration and Naturalization Service

TRANSCRIPT OF HEARING—March 28, 1951

By Hearing Officer

Resumed Hearing in Deportation Proceedings in the Case of David Hyun.

Place of Hearing: Los Angeles, California.

Date of Hearing: ——

Persons Present:

John B. Bartos, Hearing Officer
Sidney Broffman, Examining Officer
Norma Williams, Stenographer
Milton S. Tyre, Counsel of record for respondent

A3 611 569 David Hyun, Respondent

Record by Stenographer and Dictaphone

Hearing Officer:

This hearing was continued on March 13, 1951, in order that the respondent might familiarize himself with deposi-

tions marked Exhibit 5 of the record for identification purposes, to confer with his counsel, and in order that cross interrogatories might be prepared if the respondent and his counsel so desired.

Hearing Officer to Examining Officer:

Q. Are you ready to proceed Mr. Broffman?

A. Yes, I am and I might state before we get into the [fol. 104] matter of the interrogatories, at an appropriate time I want to make some statement for the record.

Q. What statement do you have?

A. Well, it is my understanding that the Circuit Court in the habeas corpus matter of this respondent and others commented upon the delay in these hearings and I want to state that when the depositions were taken from witnesses in Honolulu on December 18, 1950, they were thereafter subsequently transcribed and received in the Los Angeles office January 15, 1951.

Examining Officer:

On January 22, 1951, a copy of the transcript of the depositions was sent by registered mail to respondent's counsel with instructions to submit cross interrogatories, if he had any, within 10 days.

No cross interrogatories were received within the 10-day period and thereafter I telephoned Mr. Tyre's office to inquire as to his intentions. He was not in and I left word for him to call back. I did not receive a return phone call and thereafter telephone his office again on two additional occasions spaced several days apart. On none of these occasions was Mr. Tyre in his office and I left word there as to the subject matter of my call and again requested that I be informed as to Mr. Tyre's intentions.

I never did get any return phone call or other communication from Mr. Tyre's office regarding this matter and thereafter the hearing date was set for March 13, 1951, which [fol. 105] was the last hearing in this case.

I merely state this for the record so that in case the matter of undue delay is raised at some future time I

want the record to be clear as to what has happened thus far.

Hearing Officer:

I am uncertain about the propriety of such proceedings and the case was set for Mar 13, 1951, and I allowed Mr. Tyre 10 days within which to assemble his cross interrogatories if he desired. The hearing was not set and it was not called to my attention. At the hearing on March 13 Mr. Hyun stated he had not seen them.

Have you anything further?

Examining Officer:

No, not at this time.

Hearing Officer:

Are you ready to proceed Mr. Tyre?

Counsel:

Yes, we are.

Hearing Officer:

You may proceed.

Counsel:

Incidentally, before I proceed. Before we close this hearing—I don't want to take up the time of the Hearing Officer now but I would want to respond to what Mr. Broffman has stated both as to facts and as to inferences to be drawn from the alleged facts stated. However, I don't think this is the proper time now. The Hearing Officer has indicated he doesn't believe that this bears in any way upon the present record and I agree. I want to state now and make sure it is on the record that there has been no intentional delay on my part and I want the record also to [fol. 106] show that Mr. Hyun has at all times since October 23, been in continual custody of the Immigration director for this district and has been in Terminal Island, some 20 miles distant from the City of Los Angeles and my office.

Hearing Officer:

Well now Mr. Tyre the purpose of holding the hearing up here is for your convenience. Ordinarily the people who are detained at San Pedro their hearings are held at San Pedro. If you would prefer that the hearing be held at San Pedro we can accommodate you.

Counsel:

I am only stating for the record the reason why there was a delay between the time these depositions were received by me and the time that the hearing was held. I also want to state, Mr. Hearing Officer, I am not criticizing Mr. Landon for this; I think it is inevitable sometimes to do this; but I made one or two calls to Mr. Landon during the past couple of months which have not been returned. I am not saying that Mr. Landon purposely avoided the call; I don't think he did; I think he got tied up as busy people get. The same was true when Mr. Broffman was calling me; there was no intent to avoid his telephone call. As a matter of fact I had a telephone conversation with Mr. Broffman which maybe he has forgotten, prior to February 21st.

Hearing Officer:

Well, now——

[fol. 107] Counsel:

Just a minute. Mr. Broffman has made a statement for the record, Mr. Bartos, and I think I am entitled to reply to it, since he was allowed to make it.

Hearing Officer: Go ahead counsel.

Counsel:

I asked Mr. Broffman if Mr. Hyun couldn't be brought up here prior to a hearing so we could go over these depositions. I believe Mr. Broffman told me that that was outside his jurisdiction to have people brought up, that I would have to take it up directly with Mr. Landon. I called Mr. Landon and not having a response to my telephone call I then wrote him a letter, Mr. Landon, on February 21st,

asking if Mr. Hyun could be brought up here. I received no reply whatsoever to that letter either by telephone or in writing, and on the 27th of February I received a notice from Mr. Landon's office that this hearing had been scheduled for March 13th.

There was no intent to delay on our part and I also want the record to show that these depositions are of the most significance in this case since they represent the only evidence of the government against Mr. Hyun, and I think I am entitled to very careful consideration of the contents thereof.

I am now ready to proceed with this hearing.

Hearing Officer:

I just want to state that the reason counsel was granted the continuance on March 13 was for the reason that Mr. [fol. 108] Hyun had not seen the information in the depositions and this is Mr. Hyun's hearing and I am going to see that he gets a hearing and that he has every opportunity to comment on any of the evidence.

Counsel:

At the last hearing Exhibit 5 was offered for identification, consisting of the depositions of Richard M. Kageyama, Donald T. Uesugi, Ichiro Izuka and Easter J. Doyle, which depositions were taken without the presence of David Hyun or his counsel, in Honolulu on December 18, 1950. At the last hearing the deposition was offered only for identification. As I understand it the Examiner was going to reserve ruling on the admission of that exhibit until this hearing.

At this time I want to object to the introduction of the exhibit itself, the depositions, on several grounds.

First on the ground that the deposition was taken over the objection made on this record on several occasions by David Hyun and his counsel. The objections I think are already of record and briefly so that my record will be clear at this time on my objection to the introduction to the depositions based upon the fact that this entire proceeding is in violation of the Constitution and the McCarran Act itself is in violation of the Constitution——

Hearing Officer:

Just one moment counsel, let's take first objections first. Your first objection is that they were taken over your ob-
[fol. 109] jection, is that correct?

Counsel:

There is only one objection, that is to the introduction of the documents. There are several grounds for that objection.

Hearing Officer:

State your grounds separately and I will give you a ruling on each ground.

Counsel:

Well I don't know that any one ground would be adequate for the Hearing Officer. If it is, fine. Generally we make all the objections and perhaps together we make all the grounds and perhaps together they offer sufficient grounds to sustain the objection.

Hearing Officer: Very well, proceed.

Counsel:

First I object to the depositions as I said before on the ground they were taken over the objections of counsel. These depositions were taken about 2500 miles away; the depositions were taken in the Territory of Hawaii, 2500 miles away from Los Angeles where these hearings commenced, where David Hyun was arrested and where he is now in custody and which is his regular residence and has been for some 4, some 3½ years.

Counsel was not permitted expenses to be present in Honolulu, nor was David Hyun permitted the right to expenses to go to Honolulu in order to confront these witnesses against him and in order to be present to cross
[fol. 110] examine these very vital witnesses. Inasmuch as these depositions were taken over strenuous objections, I believe that they ought not to be admitted at this time, the objection, of course, being that it was unconstitu-

tional since it was a denial of David Hyun's due process and a fair hearing, for depositions to be taken 2500 miles away unless he confronted to them.

I object further on the ground that this entire proceeding is in violation of the Constitution and that the McCarran Act itself is unconstitutional.

I object further on the ground that David Hyun has been continually since October 23 and is now in custody of the District Director and he has been refused his liberty even though he is ready, willing and able to post bail; that his being held in custody is illegal and unconstitutional and in violation of his rights under the federal constitution; that any hearing which proceeds, especially a hearing which is 2500 miles away from the defendant's home, is necessarily violative of his rights, his natural rights as a person resident of these United States when he is being held in continual custody and not even released upon bond.

I wish further to object to the introduction of the depositions question by question and answer by answer. I don't know what the Department's procedure is for the introduction of the depositions. Ordinarily, I would assume that a deposition would be introduced by offering each question and answer and allowing objection to each [fol. 111] and a ruling thereon. I don't know what the Hearing Officer's desire is at this time in this respect.

Hearing Officer:

You have made an over-all objection to the depositions and you have made two over-all objections to the proceedings. We will take your first three objections up at this time.

In deportation proceedings the government does not have the burden of sending the respondent or his counsel to the place where the depositions are taken. Therefore, your objection on that ground is overruled.

As to the constitutionality of the McCarran Act, that is not for me to determine. It was passed by the Congress of the United States. The charge in the warrant of arrest in this case is within that Act. The constitutionality of the Act is for the courts to determine, not me. Counsel's objection on that ground is overruled.

As to the matter of the detention of the respondent that is not within my province to release him or detain him. The Attorney General ordered him detained. Counsel has petitioned for a writ of habeas corpus because of the detention of the respondent. The petition was dismissed in the United States District Court. The ruling of the District Court was affirmed by the United States Circuit Court of Appeals for the Ninth District. Counsel's objection on those grounds are overruled.

Counsel were there any other objections interposed in [fol. 112] there on those general grounds that I perhaps have missed?

Counsel: No.

Hearing Officer:

As to the depositions themselves counsel has objected to them in their entirety and that has been overruled. However, counsel may take them up question by question if he so desires.

Counsel:

I do. At the outset I want to state that on page 1 of the deposition, the first statement made by the Examining Officer there is reference to the fact that a registered letter had been sent to me as attorney for the respondent. I want to acknowledge the fact that such letter has been sent, and I did have advance notice of the hearing in Honolulu. However, in the same statement made by the Examining Officer there is some hearsay reference to conversations with another attorney in Honolulu. I want to state clearly for the record at this time that at no time has any attorney in Honolulu or anywhere else ever had the authority either from David Hyun or from me to act as counsel for David Hyun in any part of this particular proceeding, that is in deportation proceedings, whether at a deposition or any other hearing. Any statement contained in the Examining Officer's statements which may infer that Mr. Hyun was represented directly or indirectly at those depositions or it was contemplated that he would be represented at those depositions should be negated, as the fact is that he has

never been represented nor has he sought representation [fol. 113] in Honolulu. The reasons are as previously stated that it was impossible to cross examine witnesses 2500 miles away by another lawyer without the presence of David Hyun himself and/or his lawyer who has handled the proceedings up to that point. I just want to make the record clear on that.

Hearing Officer:

Just one moment, Mr. Tyre, I see here and I know that Mr. Hyun was not represented by counsel out there. However, I do not make any agreement with your statement that it was impossible that he be represented there at the time the depositions were taken.

Counsel:

Well, by impossible I don't mean it was physically out of reach. I mean that it was impractical for David Hyun to be represented in Honolulu by another lawyer to cross examine witnesses without the presence of Mr. Hyun to assist in such cross examination, or at least without the presence of his own counsel, which I think in itself would have been inadequate. I am not asking the Hearing Officer to agree or disagree. That is merely a statement by me so that there will be no question on the record as to his representation in Honolulu.

Hearing Officer:

There is no question in my mind he was not represented there but there is also no question in my mind but that he could have been represented there.

[fol. 114] Examining Officer:

I think the record should also reflect that if Mr. Hyun had desired he could have been there in person too if he could have made the financial arrangements.

Counsel:

Mr. Hyun was in custody at that time.

Examining Officer:

That's right, he was in custody but there was no request on his part at any time after he received notice of the fact that depositions were to be taken that he could be present at the hearing and if he had so indicated arrangements would have been made by the government to have him brought to Honolulu under proper safeguards.

Hearing Officer:

Each of you gentlemen have referred to a hearing in Honolulu, in the Territory of Hawaii. There was no hearing in the case of David Hyun in the Territory of Hawaii. Depositions pertinent to the issues in this case were taken in the Territory of Hawaii and we have those depositions here to be considered in the hearing which is here, not in Honolulu.

Examining Officer:

That's true. I erroneously referred to the taking of depositions as the hearing.

Hearing Officer:

It was not a hearing.

Examining Officer:

Nevertheless Mr. Hyun could have been present at the time the depositions were taken.

[fol. 115] Hearing Officer:

Nevertheless he was not there and the depositions are here. Proceed Mr. Tyre.

Counsel:

I might say that each question and answer has been numbered consecutively I understand in the original deposition which is now identified as Exhibit #5. Mr. Broffman and I have each numbered our respective copies of the deposition exactly as the original has been numbered and I shall refer rather to question numbers rather than

to repeat the full question unless the Hearing Officer desires otherwise.

Hearing Officer:

It is your pleasure counsel, but the original deposition has been numbered as to the questions as you have stated.

Counsel:

We object to question No. 36 on the ground that the question assumes facts not in evidence.

In question No 35 the witness was asked whether he had previously known David Hyun and his answer to question 35, he says that he does not know him; he stated:

> "Well, previously, well I recall seeing him in Kauai. I don't know him."

Question 36 asked: during what period of years the witness knew David Hyun. Objection is therefore repeated that the question is improper since it assumes a fact not [fol. 116] in evidence, namely that the witness knew David Hyun at all in Honolulu.

Hearing Officer:

What were you going to say Mr. Broffman?

Examining Officer:

I was going to say that the answer to question 35 was not repeated in full by counsel. The rest of that answer:

> "Since I met him I told him, Weren't you in Kauai? And he said, Yes. Actually knowing him, you mean in Honolulu?"

is, I think, considering the apparent difficulty with this particular witness in speaking fluently the English language, I think is an explanation of his answer.

Hearing Officer:

In considering the question with the continuity of the record I think it is clear. That objection is overruled.

Counsel:

I object to question No. 38 on the ground the question is leading and suggestive.

Hearing Officer:

Overruled.

Counsel:

I move to strike the answer to question No. 38 on the ground the answer is not responsive to the question.

Hearing Officer:

That is overruled.

Counsel:

I move to strike the answer to question No. 39 on the ground that the answer is not responsive to the question asked and on the further ground that the answer is ir-[fol. 117] relevant and immaterial to the issues in this proceeding.

Hearing Officer: That is overruled.

Counsel:

I object to question No. 41 on the ground that it assumes a fact not in evidence and that no proper foundation has been laid for the question. It calls for a conclusion of the witness.

Examining Officer:

The witness is apparently answering to the best of his ability. As to the weight to be given that answer that's for the Hearing Officer, but as to its admissibility I think it is admissible and is directly relevant in view of the witness' subsequent testimony in regard to who Charlie Fujimoto is.

Counsel:

I am not talking about subsequent answers Mr. Broffman. We are talking about previous answers. That's the only

way you can determine whether or not a question is proper. It is simple to say it only goes to the question of weight. That's no answer. When you asked him who sponsored the meetings, you have to lay a foundation first if he knows and that being done how he knows. You can't merely say who sponsored them, any more than you can ask Mr. Hyun a question who pays Mr. Broffman. He has no way of knowing unless you lay a foundation first, even the Treasurer's office or the District Director's or some such basis. You can't go around asking questions which call for conclusions [fol. 118] of a witness unless a foundation is laid.

Examining Officer:

Considering the rest of the witness' testimony it looks to me as if this question itself is foundational for what comes later.

Counsel:

You mean lay the foundation by putting down the roof first. That's pretty flimsy.

Hearing Officer:

Objection is overruled.

Counsel:

I object to the answer to question No. 41 on the ground that it is clearly not responsive to a question that was put to the witness. If Mr. Broffman is interested in having subsequent statements used to determine whether the question is any good I think that answer clearly shows that the question was objectionable.

Examining Officer:

It still appears to me to be foundational for what comes later.

Hearing Officer:

Objection is overruled. Proceed Mr. Tyre.

Counsel:

I object to the answer to question No. 42 and move to strike it, particularly the second sentence of the answer,

on the ground that it goes beyond the question that is asked and is not responsive and also immaterial and irrelevant to the issues at hand and is the answer of a witness who is [fol. 119] incompetent to answer as to that particular portion of the answer to question 42.

Hearing Officer.

It appears to me that this particular witness belonged at various times to different cells of the Communist Party and I gather from the question that he attended the meetings of those cells in the various places.

Counsel:

Mr. Bartos if you think so I suggest you read the answer to question No. 45. The question was——

"To what group or cell of the Communist Party did you belong?"

Answer: "I actually did belong to the Makiki cell."

In the answer to question No. 42 it is clearly non-responsive; it goes beyond the question. He says "I belonged to the Mikiki cell" and then he describes a lot of other things without stating whether or not he belonged to those. The answer to question 45 makes it clear that he belonged to the Makiki cell, not to these others, he was merely talking about a lot of conversation and hearsay. I don't think you have to look, incidentally, Mr. Hearing Officer, to subsequent answers and questions to determine whether or not a particular question is objectionable. Sometimes you allow it for the moment subject to a motion to strike later if it isn't tied in. That I recognize, but these particular questions and answers to which I am objecting cannot be rationalized in permitting them to be admitted on that [fol. 120] basis and even if it could it is obvious if you read the rest of the answer that my objection is well taken.

Hearing Officer.

Mr. Tyre, I have been considering these questions and answers to which you object as if that witness were here testifying and hadn't given any other answers, without ref-

erence to the balance of the deposition. Apparently you have been considering the depositions in whole and then taking the answers as if they were being given and also in connection with subsequent answers.

Counsel:

To the contrary. I tried to do precisely the opposite from that. I try to make these questions objectionable as they are asked. You and Mr. Broffman have both said "well if you read the rest of it you see that it's tied in, or that he is making reference to it, it is obvious that he was a member of more than one cell, if I may quote yourself. But the answer to that particular question doesn't show that. He says he was a member of the Makiki cell and then he goes on to talk about the other cells without saying that he was a member of those.

Hearing Officer:

You have objected to the answer to question No. 42. The answer to that question was——

> "Well, I belonged to the Makiki cell and then the Punchbowl cell."

[fol. 121] Counsel

And I move to strike the second sentence as I stated and the record will show, as going beyond the question asked, it is non-responsive and it is immaterial, irrelevant and incompetent, and I think if you will read the second sentence, Mr. Bartos, compassionately, you will see that that is not an answer to the question that was put.

Examining Officer

I want to call the Hearing Officer's attention to question 43.

Hearing Officer: Just one moment, we are considering No. 42 now.

Examining Officer

Yes and I ask that question 43 and the answer thereto be considered in connection with question 42.

Counsel

You will have to listen to my objection to 43 also.

Hearing Officer: Counsel I am listening to any of your objections.

Counsel:

I mean I don't think you ought to consider 43 but if the Hearing Officer does I want to object to that as well.

Examining Officer:

I simply comment that the answer to question 43 appears to be explanation of the previous question No. 42.

Hearing Officer:

[fol. 122] The second sentence of the answer to question No. 42 to which counsel objects and moves to strike, seems to me to be descriptive. The objection is overruled.

Counsel:

I object to question No. 43. The question says:

"These places that you are describing were the scenes of these meetings?"

I think that question is purely leading and suggestive and no proper foundation has been laid, namely whether or not he was present at such places to know whether or not they were meetings. I think the question is objectionable, leading and suggestive and no proper foundation laid.

Hearing Officer:

I agree with you that the question could have been better worded. However I don't think it is harmful. I overrule your objection.

Counsel:

I want the Hearing Officer to note that to say it is not harmful what this witness is now doing is stating that certain places had certain meetings of the Communist Party in order to indicate this witness had knowledge of the Com-

munist Party, but there has not been a single question asked yet as to whether or not he was present at those places; not a single question. I move to strike the answer to question No. 43 in which he says:

> "Yes those are the places where they had the meetings."

[fol. 123] on the ground that there has been no proper foundation for the question and that the answer is based upon pure hearsay. He still hasn't said that he was present at those places or at those meetings.

Hearing Officer:

Well the answer to question 39 shows that this deponent attended the meetings. Counsel's objection is overruled.

Counsel:

If I may comment on the Hearing Officer's comment. Question 39 says:

> "My belief is, at the meetings I have been I seen him there, so I presume he is a communist."

It was then asked which meeting. He says:

> "Well at one meeting where I saw him was at Makiki at Charlie Fujimoto's place. He was there."

Not a single statement that he was present himself at any other meeting to indicate that he knows whether or not there were any other meetings and if there were where they took place and if they took place whether or not they were meetings of the Communist Party.

Question No. 44 I object to on the ground that it is leading and suggestive and again no proper foundation. The question is——

> "Do I understand you to state that these were Communist Party meetings at these places?"

[fol. 124] when the witness hasn't yet stated that he was present at any of those meetings at any of those places or

has he stated that they were Communist Party meetings, but that doesn't bother the Examining Officer. He says—

"Do I understand you to state that these were Communist Party meetings at these places?".

This is purely the type of leading and suggestive question which is objectionable and the answer to is simply must be stricken as well as the question itself and objection is made to the question.

Hearing Officer: Overruled.

Counsel:

I believe I stated also; if not, I would like the record to show that I object to the question further on the ground no proper foundation has been laid for the question.

Hearing Officer: Overruled.

Counsel:

I now renew my motion to strike the answer to question No. 42, namely——

"To which group or cell did you belong".

I move to strike the answer to that on the ground that the witness has now stated in his answer to question 45 that he actually did belong to the Makiki cell, and since question 42 and the answer thereto have not been tied in or at least that the answer to question 45 does not indicate that [fol. 125] the answer to 42 is non-responsive, that is the second sentence of answer 42 and I now renew my motion to strike the second sentence of answer 42.

Hearing Officer: Overruled.

Counsel:

I object to quesiton No. 47 on the ground that it is leading and suggestive. The question is whether or not the witness

was treasurer of the group. Up to that point the witness has not stated that he was treasurer.

Hearing Officer: That's overruled counsel.

Counsel:

I object to the answer to question No. 47 on the ground it is not responsive to the question. It doesn't say whether he was or was not the treasurer of the group.

Hearing Officer:

Apparently, I gather from the answer that this deponent didn't know anything as to his position other than that he collected dues as shown by the answer to question 46. That's overruled.

Counsel:

Question 46, if the Hearing Officer please, asks the express direct question, which is not objected to:

> "Did you hold any appointive or elected office in that cell?"

In the answer to question 46 he doesn't say whether he did [fol. 126] or he didn't. The next question should have been, I repeat the question—

> "Did you hold any office . . ."

instead of saying—

> "Well were you the treasurer".

in effect telling the witness what his answer should be; even then he doesn't answer.

I object to question No. 49 on the ground that it's irrelevant and immaterial. The question is—

"How did you happen to join the Communist Party" Now that is the type of question, Mr. Hearing Officer, that a ruling could be reserved upon like I mentioned before, subject to being tied in later on, if for example the answer would have elicited if David Hyun had asked the witness to join the Communist Party then I would say that that was

a relevant and material question, but in view of the answer which we now have I have to object to the question because the answer itself indicates it's irrelevant and immaterial and calls for hearsay which clearly is not binding upon David Hyun.

Hearing Officer: That's overruled.

Counsel:

I object to answer—I move to strike the answer to question 49 on the ground that it contains irrelevant and immaterial matters. It states that he joined the Communist Party because of his ex-wife. Now how that can in any [fol. 127] way remotely affect David Hyun's right to live in this country, I can't figure out.

Hearing Officer:

Well it appears to me that it shows that that witness was a member of the Communist Party, that he joined it, regardless of why it places him within the Party.

Counsel:

I think evidence to show that he was a member of the Communist Party would be relevant and material assuming the questions were proper, but to say that he joined it because of his ex-wife or because of any other reason isn't material. The material thing is was he a member, not "How did you happen to become a member," unless as I said, that can be tied in with David Hyun, which the answer does not do. That is why I move to strike the answer.

Hearing Officer: That's overruled.

Counsel:

I object to question No. 50, again on the ground that it is irrelevant and immaterial, refers back to the answer to 49, asking him to more fully explain his answer, which in itself is irrelevant and immaterial.

Hearing Officer: That is overruled.

Counsel.

I object to the answer to question 59 and move to strike it on the ground it is irrelevant and immaterial and contains considerable matter which is not only irrelevant and immaterial but conclusions of the witness and hearsay which [fol. 128] is not binding upon David Hyun, in which he discusses the question of a divorce, the pressure of his wife, no tie-in with David Hyun in any way.

Examining Officer:

In view of the Hearing Officer's ruling on question 49 I think the answer to question No. 50 should be allowed to stand.

Hearing Officer: That is overruled.

Counsel:

Object to question 53 on the ground that it is leading and suggestive. Question 53 for the first time states—

> "When did you start paying dues, about this same time?"

Now the question is obviously objectionable. If the questioner wanted to ask the question he should have at least split it up into two parts and said—

> "Did you pay dues"—"yes" or "no"—"And if so when did you start paying".

instead of suggesting to him that he started paying dues at about this same time. I renew the objection that it is leading and suggestive and also assumes facts not in evidence.

Hearing Officer: That is overruled.

Counsel:

I object to question No. 54, again on the ground that it is leading and suggestive. The questioner asked—

> "Did you receive a card or a book or something [fol. 129] that described you as a member of the Communist Party?"

Now if this Examining Officer were in good faith and were asking questions to find out answers instead of putting them in the witness' mouth, he could easily have said—"did you receive any evidence of any kind of your membership" instead of suggesting that he received a card or book or something that described him as a member. I repeat the objection that it is leading and suggestive and assumes facts not in evidence.

Hearing Officer: That is overruled.

Counsel:

I object to question No. 59 on the ground that it is irrelevant and immaterial on this basis. The question asked "Who is Charlie Fujimoto". Now I say that is irrelevant and immaterial because in the answer to question 58 he says that he saw David Hyun at Charlie Fujimoto's home in Kaia Street and about 2 or 3 times at Punchbowl Street; then he goes on in his last sentence or a portion of his sentence before he was stopped by the question and he says:

"And on the meetings, well, I never saw him"

and if he never saw him at a meeting then it is irrelevant and immaterial as to who Charlie Fujimoto is.

I also want to object to the question 59 and the answer to 58 on the ground the witness was obviously interrupted when he started to say "and on the meetings, well I never saw him". Then the questioner says—

[fol. 130] "All right. Going back to the occasions of the meetings . . ."

I think the way this question was propounded before the witness completed an answer which was harmful to the government, was unfair and not in good faith; therefore, I object.

Examining Officer:

Reading a little bit farther down, subsequent questions, it looks to me as if the Examining Officer reminded him-

self that he should first establish who Charlie Fujimoto is and that is why he stopped the answer to question 58.

Counsel:

I appreciate Brother Counsel assisting Brother Counsel. If he never saw David Hyun at meetings or at the governor's house that wouldn't have any effect upon whether or not David Hyun was a member of the Communist Party. The questioner interrupted at a very crucial point when he started to say . . .

Examining Officer:

I don't see how that would be helpful to the Examining Officer. If anything it would be helpful to David Hyun but it is obvious the answer was never even completed. As to what the witness intended to say can only be gleaned from subsequent testimony.

Hearing Officer:

I don't know what the witness intended to say. I only know what he said. Overruled.

[fol. 131] Counsel:

Starting with question No. 60 is an entire line of questioning concerning meetings at Charlie Fujimoto's house. I object to the entire line of questioning concerning meetings at Charlie Fujimoto's house on the ground that these questions are leading and suggestive and assume facts not in evidence, the witness having already expressly stated that on the meetings he had never seen David Hyun, and therefore, I object particularly to question 60 on the ground that it calls for hearsay evidence, there is no proper foundation laid; in event whatever took place at Charlie Fujimoto's house in view of the answer to question 58 is immaterial, and irrelevant to the issues in this case. I further object to question 60 on the ground that it assumes facts not in evidence, namely that there were any meetings that took place at Charlie Fujimoto's house at which there were communists present. Question 60 asks:

> "Were there other people besides communists at these meetings?"

Up to that point the witness has not yet stated that there were any Communists at the meets at which he may have attended at Charlie Fujimoto's house.

Hearing Officer:

You have made a running objection counsel to questions regarding meetings held at Charlie Fujimoto's house from [fol. 132] question 60 to what other question?

Counsel:

It is hard to tell from these answers Mr. Hearing Officer when he is talking about Charlie Fujimoto's house and when he is talking about somebody else's house. It is just impossible to tell. All I can say is that wherever the answer implies or directly states that he is referring to a meeting of Comunists at Charlie Fujimoto's house, the objection goes to that line.

Examining Officer:

If the Hearing Officer will direct his attention to question 57:

> "Now in connection with the activities of the Communist Party, do you remember any occasion that you say David Hyun at party meetings?"

Answer: "I do." And then having that base question 57 in mind I think the rest of the testimony is clear as to what is being attempted in development.

Counsel:

Well I didn't object as the Examining Officer has noted. to question 57 when he said "did you see David Hyun at Party meetings" and he said "I do". Now that doesn't bother me. I am interested in the details of it. Then he starts to describe details in answer 58, he said—

> ". . . most of the time I saw him at Charlie Fujimoto's house and so on"

[fol. 133] Then he goes on in the same answer—

> "And on the meetings well I never saw him . . ."

Examining Officer: Unfinished.

Counsel:

Unfinished because he was interrupted by the questioner because he said—

> "Al right. Going back to the occasions of the meetings".

So far he hasn't yet stated that he saw him at any meetings when he was asked that particular question and to describe it, in fact he stated to the contrary. In any event I object to the entire line, but I do have objections to the particular questions in any event as I go along.

Hearing Officer:

We will take your objections up as we go along. We are on question 60 now. That's overruled.

Counsel:

I object to question 61. No. 61 says—

> "Well was it your understanding that these meetings which Charlie Fujimoto directed, were these meetings of the Communist Party."

Now I object to that question on the ground it is clearly leading and suggestive, it calls for a conclusion of the witness, no proper foundation has been laid, and it assumes facts which are not yet in evidence, unless the statements [fol. 134] of the Examining Officer and his questions can be assumed as evidence, which of course they cannot.

Hearing Officer: Overruled.

Counsel: I object to question 62 on the ground that it is leading and suggestive and this is a classical type of question that one learns in law school as being objectionable and I assume that the Examining Officer in this case had at least gone to some sort of law school. In answer to question 61 he says—"They were meetings of the Communist Party." The next question to have asked was "Who was present at those meetings" and then when the answer to the question has exhausted the witness's memory as to

who was present and if he has not yet named David Hyun then the questioner can say "have you now exhausted your memory as to who was present" he says "yes", then you can ask him "well was David Hyun also present" and he can answer yes or no, but that's not the way this questioner did it at all. He said "Were these Communists Party Meetings"—"Yes"—"Did David Hyun attend those meetings?" "Yes". No! that is clearly leading and suggestive and it is objectionable as any question in a proceeding can possibly be and this is a key question; this is supposed to be the question that ties in David Hyun as being present at a Communist Party meeting.

Examining Officer: As to who else was present I think would be immaterial. In this hearing the only person we are interested in is the respondent.

[fol. 135] Hearing Officer: That's overruled.

Counsel: I object to the latter part of the answer to question No. 63 and move that it be stricken. The question 63 is after he had stated that David Hyun had attended some of the meetings. Question 63 then says—

> "Do you remember any specific occasion when David Hyun—"

and then the answer is—

> "Don't rem--ber any specific meetings when he was there."

I object to the rest of it which says—

> "but I know I saw him there".

The question was:

> "Do you remember any specific occasion when David Hyun was there"

and he says—

> "I don't remember any specific meetings"

and that is the answer to the question. The rest of it is speculative, it goes beyond the question and is not respon-

sive. I therefore move that that part of the answer starting with ". . . when he was there but I know I saw him there" be stricken.

Hearing Officer: Motion denied.

Counsel: I object to question No. 67 on the grounds that it is leading and suggestive and assumes a fact not in evi- [fol. 136] dence. The Hearing Officer will recall that previously the witness had stated that he was a member of only the Makiki Cell. He now asks him whether or not he had seen David Hyun at meetings on Punchbowl Street. I think that this asumes a fact therefore which is not in evidence and it is leading and suggestive.

Hearing Officer: Well that appears to relate back to the answer to question 42. That is overruled.

Counsel: I object to question 68 in which he asks whether the meetings on Punchbowl Street were Communist Party meetings, on the ground that such a question again is basically leading and suggestive and it assumes a fact not in evidence, namely that these were Communist Party Meetings. It's also irrelevant and immaterial because no proper foundation has been laid as to when these meetings took place or whether David Hyun was present at the meetings or was even in Honolulu at the time the meetings took place.

Hearing Officer: Overruled.

Counsel: Object to question No. 70 on the similar ground that it is leading, suggestive, also no proper foundation has been laid as to where the meetings took place or when they took place; it calls for a conclusion of the witness.

Hearing Officer: It is overruled.

Counsel: And the same objection as to question No. 71. [fol. 137] Hearing Officer: That is a repeated question of 70; that is overruled.

Counsel: That is why I repeated the objection.

Counsel: Question No. 72 is objected to. The question says—

> "Was there anyone at these meetings who was known to you as not a member of the Communist Party?"

I object to that as leading and suggestive and assumes a fact not in evidence still, namely that anyone present at the meeting was a member of the Communist Party.

Hearing Officer: That is overruled counsel.

Counsel: Then this summarizing question No. 73 I object to. Just as though the questioner were not yet satisfied that it was clearly stated, he says—

> "Can you state definitely that all the persons at this meeting were members of the Communist Party?"

Now there is no foundation laid for the idea. It is clearly leading and suggestive and obviously calls for a conclusion of the witness. All the witness can state, who was present at the meeting, what was said, what was done, what was distributed, what was read, what the activities were; that tells us, at least give us some inkling as to whether the meeting was a Communist Party meeting; but to ask the witness whether everyone there was a member of the Communist Party obviously calls fc his conclusion. [fol. 138] How does he know whether they were members of the Communist Party. He says that they were present. That's for the Hearing Officer or the Commissioner or the Attorney General or the Court to determine if they were members of the Communist Party. That's the ultimate question, really rather the secondary ultimate question finally to be decided. It can't be asked of the witness. I repeat my objection, it is leading and suggestive and calls for a conclusion, and assumes a fact not in evidence.

Hearing Officer: About the only way I know of to find out whether he knew they were all member- of the Communist Party would to ask him.

Counsel: That doesn't prove anything. He's got to give me evidence upon which that is based.

Hearing Officer: Maybe he did.

Counsel: Well so far he hasn't, if the court pleases, and even if he had it is not for him to conclude whether they were member- of the Communist Party. That is for the decider of the facts, the trier of the facts to determine. If, for example Mr. Hearing Officer, this witness had been asked one question—"was David Hyun a member of the Communist Party" and he answered "yes" and that was all the evidence the Assistant Commissioner had, there wouldn't be any question that David Hyun would not be [fol. 139] deported. That isn't evidence of his membership

in the Communist Party because someone says he is a member. The next question is how do you know he is a member—were you present at any meeting—where were those meetings— when were those meetings—what took place—was David Hyun there—what did he say—what did other people say who were there. These are matters, if the court please, which go to make up the evidence to show that those who were present may have been communists, but it is a sheer, utter and naked conclusion of the witness to state that these people are member- of the Communist Party.

Hearing Officer: You were objecting to the question counsel. That objection is overruled.

Counsel: Now I object to the answer to 73 and I move to strike it because it simply is not responsive to the question, at least, even if the Examining Officer didn't care, apparently the witness cared about whether or not he was telling the truth. When he says—

> "Can you state definitely that they are members of the Communist Party"

that answer can be either yes or no. He doesn't answer yes or no. He merely says—

> "according to my thinking anybody who is in that certain particular night there that they call meetings, who [fol. 140] are there, well I think they are communsits."

which is an obvious conclusion of the witness. He states he doesn't know definitely. He couldn't possibly know definitely. All that he can state is what transpired. Therefore this is a conclusion of the witness and is not responsive to the question because I don't think any answer could be responsive, and particularly this one is not.

In my remarks I do not mean to indicate that the person who is getting the questions isn't interested in the truth. What I was trying to say was that he is not interested in how the witness wants to give the answer. He appears to be more interested in putting the answers in the witness' mouth and that I do mean to infer and expressly state.

Examining Officer: The answer to question 73 I think expresses an opinion of the witness apparently based on

his previous answers that the meeting concerned itself with Communist Party business and other references to Charlie Fujimoto and so on.

Hearing Officer: That is overruled.

Counsel: I would like to incidentally now that Mr. Broffman has refreshed my memory—I had forgotten to do this—I would like to renew the objection as to questions 70 and 71 which are repeats, on the grounds other than those I have already stated, that they are vague and indefinite as to what is meant by Communist Party business. This witness hasn't been qualified as an expert on what is meant [fol. 141] by Communist Party business. In any event I think such a phrase would be vague and indefinite and would call for a conclusion of the witness. I would like to add those objections to ones I previously made to those particular questions.

Hearing Officer: That is overruled, counsel.

Counsel: I object to the question 74, which refers back to the answer to 73, instead of the questioner asking him why he thinks these people are communists, he tells them why. If that isn't leading and suggestive I don't know what is. The question isn't even put in question form until the end. He says—

> "You know this because of your familiarity with the communist procedures, is that correct?"

Obviously the witness said "yes". I object it is typically leading and suggestive as almost all these questions in this deposition are.

Hearing Officer: That's overruled.

Counsel: I object to queston No. 75 on the ground it is irrelevant and immaterial.

Hearing Officer: Overruled.

Counsel: Object to question 76 on the same ground.

Hearing Officer: That's overruled.

[fol. 142] Counsel: I object to question 77. It states—

> "Did David Hyun attend meetings where matters like you have just described and discussed, that is, those matters which were supposed to be known only to members of the Communist Party?"

I object to such a question on the ground that it is clearly leading, suggestive, assumes many facts not in evidence, and there has been no proper foundation yet laid for such a question.

Hearing Officer: That is overruled.

Counsel: I object to question 78 on the ground that it is leading and suggestive, it assumes a fact not in evidence, and also on the ground that the meaning of the phrase "closed meetings" is vague and indefinite. That answer to 78 clearly indicates the vague and uncertain meaning of the word "closed meetings" when the witness says that they were definitely communist meetings because they closed the doors. I think the doors in this room are right now closed. But I say only because it shows a vague and indefinite meaning of the prase "closed meeting". The witness indicates he doesn't know what it means. Therefore I object to the question and move to strike the answer.

Hearing Officer: Objection is overruled and the motion is denied. Proceed Mr. Tyre.

[fol. 143] Counsel: I object to question No. 79 on the ground that it assumes a fact not in evidence, namely whether David Hyun belonged to any group or cell, and on the further ground that it calls for a conclusion and speculative answer. The question says—

> "Do you know to which group or cell David Hyun may have belonged?"

Hearing Officer: It is overruled.

Counsel: May I add a further objection to that on the ground that no proper foundation has been laid.

Hearing Officer: It is overruled.

Counsel: I move to strike the answer to question 80 on the ground that it is not responsive to the question. The question was—

> "Do you know definitely that he belonged to either or both of these cells?"

His answer is—

> "Well from my own opinion I think he is a communist. Otherwise I had never seen his card but by seeing him at the meetings."

It is certainly and clearly not responsive to the question as to whether he belonged to either or both of the referred to cells. Therefore I move to strike the answer.

Hearing Officer: Motion is denied.

[fol. 144] Counsel: I object to question 81 asking if the witness had any reason for believing that David Hyun was not a communist, on the ground that such a question is irrelevant, immaterial, and certainly calls for conclusion of the witness, for hearsay and is vague and indefinite.

Hearing Officer: It is overruled counsel.

Counsel: I object to what appears to be a question. We have numbered it 82. It seems to be more of a statement of the Examining Officer following by a question "is that correct?" Now the questioner says—

> "Because he attended closed meetings of the Communist Party which you knew was not open to anyone else but Communist Party members, is that correct?"

Now that's summarizing and nicely stating it perhaps better than the witness could possibly state it or was able to state it because of his lack of knowledge and I object to such a question as being purely leading and suggestive, assuming facts not in evidence, no proper foundation laid, as to how the witness knew or whether he knew that the meetings were not open to anyone but Communist Party members.

Hearing Officer: That's overruled.

Counsel: I object to question No. 88 regarding meetings [fol. 145] of the Punchbowl cell on the ground that up to that point the question is irrelevant and immaterial, no proper foundation has yet been laid; it assumes a fact not in evidence that David Hyun ever attended a Punchbowl cell meeting or that the witness ever saw him at a Punchbowl cell meeting.

Examining Officer: The answer to question 85 refers to meetings of the Punchbowl as well as the Makiki.

Hearing Officer: Objection is overruled.

Counsel: Question 85, if the Hearing Officer please. The question itself was objected to but overruled, but even assuming that the question were proper and the answer were proper the answer doesn't say that he was present and saw

David Hyun at the Punchbowl meeting. He only said David Hyun attended a Punchbowl meeting.

I object to question No. 89 in which he asks how many of these closed party meetings of the Punchbowl cell he say David Hyun attending, on the ground that this again is a very leading and suggestive question and assume a fact I still say is not yet properly in evidence, namely, that David Hyun ever attended a Punchbowl meeting or that the witness saw him there.

Hearing Officer: Overruled.

Counsel: I object to question 91 concerning his letter of resignation on the ground that such is irrelevant and immaterial.

[fol. 146] Hearing Officer: That's overruled.

Counsel: I object to question No. 92 as to whom he returned his Communist Party card if he had one, on the ground that that is also immaterial and irrelevant.

Hearing Officer: That's overruled.

Counsel: I object to question No. 93 on the ground that it's irrelevant and immaterial and on the additional ground that it is leading and suggestive. The questioner asked if the party had made any attempt to get in touch with the witness following his giving back the card to Charlie Fujimoto. Nothing in the record yet shows the party made any such attempt or any inference of such an attempt; therefore it assumes a fact not in evidence; it is further obviously immaterial and irrelevant to any issue that could affect David Hyun.

Hearing Officer: Overruled.

Counsel: I object to question 94 as to whether or not anyone approached him from the Communist Party since his resignation, on the ground that that too is irrelevant and immaterial, unless it is tied in with David Hyun, and his answer does not so tie it in.

Hearing Officer: That is overruled.

[fol. 147] Counsel: I move that the answer to question No. 94 be stricken on the ground that it isn't tied in to any issues, it is irrelevant and immaterial to this proceeding, on the further ground that it contains only hearsay evidence and conclusion of the witness and is not based upon any

person- observation of the witness himself concerning the question which was asked.

Hearing Officer: Motion is denied.

Counsel: I object to question No. 96 on the ground that it is leading and suggestive and the question has already been asked by the Examining Officer several times and been answered several times and the questioner apparently feels that the answer isn't quite put in the way he would like it; therefore he asks the question again in a leading and suggestive way when he says—

> "You mean either in the latter part of 1945 or the early part of 1946, is that correct?"

and the witness says "That's correct".

I suggest and make the objection that the question is leading and suggestive and been asked and answered several times.

Hearing Officer: Overruled.

Counsel: I object to question 100 on the ground that it's irrelevant and immaterial, and on the further ground that it is leading and suggestive. The witness in the answer to [fol. 148] question 99 says that he gave his dues to Eileen Fujimoto. The Examining Officer could in all correctness have stated "who is she". Instead of doing that he said "You mean the wife of Charlie Fujimoto." I don't think it's important or significant, it is irrelevant and immaterial anyway. I point out this objection because I think it is sort of typical of the way the Examining Officer has attacked this entire deposition, namely by putting the answers into the witness' mouth. I repeat the objection.

Hearing Officer: That is overruled.

Counsel: Those are the questions and answers to which I have objections concerning the testimony of the witness Uesugi.

Since it is suggested by Mr. Broffman, to which I agree, this might be a proper time to recess for lunch, and take up the next witness after lunch.

Hearing Officer: Very well, we will recess for lunch. The hearing will be reconvened at 12:30. It is now 12 o'clock.

By Hearing Officer: Hearing resumed at 1 P.M. Counsel may proceed.

Counsel: We now move to the examination of the witness Ichiro Izuka.

[fol. 149] I want to object to the answer to question 133. The only question asked in 133 is what was reactivated and the witness answered it when he said "the Communist Party." He then goes on for some 20 to 25 lines to expound upon something which he was not asked. I therefore move to strike the answer on the ground it is non-responsive to the question that was asked, and particularly that part of the answer which follows the first three words, namely "The Communist Party". I object to, move to strike the answer on the further ground that it stated—it is replete with conclusions of the witness based upon hearsay and upon many matters for which as yet no foundation has been laid. That is the trouble, as a matter of fact, when these long answers are given; it is impossible to object to portions of an answer at a time. If the answer is directly responsive to a question that is asked then it is simple to make the objection, but when the answer goes well beyond the question the only objection that can be made that makes any sense is to object that it is not responsive and this one clearly is not responsive after the first three words; therefore I repeat my motion to strike.

Examining Officer: Isn't that answer to question 133 in explanation of the reactivation?

Counsel: It merely said "What was reactivated". The answer is, if the witness is correct, "The Communist [fol. 150] Party". It then goes on to state a lot of other things. That wasn't the question. He didn't say how was it reactivated or who was involved in it. That's up to the Examining Officer that asks the question.

Examining Officer: I believe the rule is in administrative proceedings that a witness always has the right to explain his answers and as I read this answer to question 133 it constitutes in part at least an explanation of the reactivation.

Hearing Officer: Motion is denied.

Counsel: I object to question No. 135 asking

"What was the occasion that you were invited to attend the executive committee sessions of the Communist Party?"

on the ground that no proper foundation has been laid that he knows what the occasion was, and in any event it calls for conclusion of this witness as to what that occasion was since he himself did not create the occasion. He was by his own testimony merely invited to attend. It calls for hearsay which is not binding upon David Hyun. On these grounds I object to the question.

Hearing Officer: It seems to me a proper foundation was made to that question. Objection is overruled.

[fol. 151] Counsel: I move to strike the answer to question 135 on the ground that it is not responsive to the question that was asked; it contains statements that are conclusions of this witness, that are hearsay and not binding upon David Hyun. The question was simply what was the occasion for the invitation to attend the executive committee session. There is then a long discourse by this witness as to statements which on their face are obviously hearsay, about which he obviously could have had no personal knowledge. He is merely stating what he understands someone else said or someone else did. In addition to that he goes on to state in the last three sentences what actually transpired, what he claims actually transpired at these meetings, rather than merely to confine his answer as to the occasion for the invitation; so clearly as the last three sentences are not responsive to the balance of the question and not only not responsive but contain hearsay statements and conclusions of the witness. I therefore move to strike the whole answer and each and every sentence thereof.

Hearing Officer: Your motion is denied.

Counsel: I object to question No. 137 on the ground the question says—

"Why should the activities and policies and strategies of the International Longshoremen's and Warehousemen's Union be discussed at a Communist Party executive meeting?"

[fol. 152] That question I submit is irrelevant and immaterial as to whether or not David Hyun is a member of

the Communist Party. Furthermore, it is speculative as to why should the activities be discussed at such a meeting. It calls for a conclusion of the witness; no proper foundation laid as to how this witness is competent to answer such a question and such a question could even possibly be put to any witness. There is no evidence to date that he is an expert on International Longshoremen's and Warehousemen's Union problems, or that he is an expert as to Communist Party executive meetings, or that he is even a member. As a matter of fact his testimony is to the contrary; he was never a member he says of the Communist Party Executive Committee. How he can possibly answer why the International Longshoremen's and Warehousemen's Union policies and strategies should be discussed at a Communist Party executive meeting is beyond me. I repeat my objections to the question for the reasons stated. I want to add a further objection that it's argumentative.

Hearing Officer: The objections are overruled.

Counsel: I move to strike the answer to that question 137 on the ground that it is not responsive. He doesn't state in his answer why the activities and policies should be discussed at a Communist Party executive meeting. He merely states an opinion and conclusions, surmises and speculation. There isn't a single statement in there which [fol. 153] states precisely why such activities should be discussed at such a meeting, even if such a question was in the first place proper, which I again submit was absolutely improper.

Hearing Officer: Motion is denied.

Counsel: I object to question 138 on the ground that it is leading and suggestive and typical of the type of questions that this Examining Officer continually asks. Up to the question 138 no evidence yet that David Hyun was present at any of the meetings that were referred to in the answer to 137 or to 136 or to 135. Instead of asking who was present at such a meeting, which is the proper way to ask the question, the questioner in typical form says—

> "Now at this meeting which you have described the purpose of, was David Hyun present?"

He says "yes." Such a question is leading and suggestive. Therefore I object to it. It is further vague and uncertain

as to which particular meeting the question is referring to. There is a reference to this meeting at which the International Longshoremen's and Warehousemen's policies and strategies were discussed, but it isn't clear that this may be the particular meeting that he is talking about when he asked if David Hyun was present; so on the further ground I object to the question.

Examining Officer: David Hyun was the only person the Examining Officer was interested in.

[fol. 154] Counsel: The Examining Officer was interested in finding out whether or not David Hyun was a communist. He doesn't do that by putting language into the witness' mouth; just ask who was present; that's just simple, ordinary; common language used by lawyers every day. You don't ask *of* the particular person was present; that's leading. You first ask who was there. If he mentions the name of the man, fine; if he doesn't you draw it to his memory then you may ask if he has forgotten David Hyun and he can say yes or no. You don't start off with the last question. That makes the entire question improper, the basic objection to a leading question.

Hearing Officer: Objection is overruled.

Counsel: I object to question 139 in which he asks what David Hyun's purpose was for being there, since that calls for a conclusion of the witness. That was apparently something that was in David Hyun's mind, if he had any purpose in being present and if he were present; therefore it is speculative, calls for hearsay; calls for conclusion; no proper foundation laid; no proper foundation could be laid. I therefore object to the question.

Hearing Officer: The objection is overruled.

Counsel: I object to question 141 on the ground that no proper foundation has been laid, also on the ground that [fol. 155] the question is double-barreled; there are two questions in one and it is necessary to object to each question separately. He asked first—

> "What was the make-up of the executive committee of the Communist Party of the Territory?"

In the same question he says "Who attended it?" Now those who attended such a meeting may or may not be

members of the Executive Committee. Therefore the answer to the second question could be different from the answer to the first. Because it is a double-barreled question and the answer does not clearly elicit which answer. . . .

I object to the question on that further ground.

Hearing Officer: Objection is overruled.

Counsel: I move to strike the answer to question 141 as to all statements made therein concerning the representation which each of the persons allegedly present was making. In other words he states in his answer that one person was present representing one group, another person was present representing another group. The question doesn't ask him which group the person was representing. The question asked only who was on the Executive Committee and who attended it. That should be answered by giving names of persons. He goes beyond that; he gives not only names of persons but purportedly the groups which they were representing; no proper foundation laid, as a matter of fact for his knowing or being competent to answer which particular [fol. 156] groups they were representing if they were representing anybody. Further in any event it goes beyond the question which was obvious.

Hearing Officer: Motion is denied.

Counsel: I object to question No. 142 on the ground that it's irrelevant and immaterial and no proper foundation laid as to how this witness was competent to testify as to the identification of Hall and McElrath.

Hearing Officer: That is overruled, counsel.

Counsel: I move to strike the answer to question 142 on the ground that it calls for a conclusion of the witness, states conclusions of the witness rather, and on the further ground that the answer is nonresponsive after the first word. The question asked was—

> "Can you identify Hall and McElrath further than you have?"

The answer can be either yes or no. He answers it yes and then goes on to a long explanation. I move in particular to strike not only the answer but that portion of the answer after the first word "Yes." Now the reason for that is not trivial. If the witness can answer the word "Yes,"

then it is up to the questioner to establish the foundation as to how he can identify after he says he can. When he [fol. 157] goes on to say yes I can identify them then proceeds to do so without stating the foundation upon which he has such knowledge, then the answer must be stricken since it is nonresponsive and since it is not allowed me the opportunity to object to that portion of the answer which describes these gentlemen without the proper foundation having been laid first.

Hearing Officer: Taking into consideration that you were on notice of the dates these depositions were to be taken it is necessary to deny your motion.

Counsel: As I understand the procedure Mr. Hearing Officer, we are entitled to a fair hearing and to observe whatever rules of evidence are normally observed by this agency whether or not Mr. Hyun or his counsel were present during the examination. Now this—objectionable whether or not I was there or whether or not I was not there and is clearly objectionable as all the question calls for is a yes or no answer; he goes well *well* beyond answering simply yes.

Hearing Officer: Well you were the gentleman that brought up the information about not having been there at that time. Proceed Mr. Tyre.

Counsel: My presence or absence, Mr. Bartos, simply has nothing to do with whether or not a question is proper or improper.

[fol. 158] Counsel: I object to question No. 143 on the ground that no proper foundation has been laid, it calls therefore for a conclusion of the witness. The witness is asked how the branch representatives of the various groups that attended the executive committee were selected and the questioner wants to know whether they were elected or appointed. Now there is nothing in this record to show that this witness was a member of the executive committee or that he had formulated the rule of the regulations for determining how branch representatives were selected. All he can testify to is what he personally had knowledge of, that which may or may not have occurred, or at least which he testified had occurred to his own particular group or branch; therefore, it calls for a conclusion of this witness and is objectionable; no proper foundation has been laid

as to how he is in a position competently to answer the question.

Hearing Officer: He testified that he was a member of the Communist Party. Apparently he knew the procedure through his membership. Objection is overruled.

Counsel: I object and move to strike the first two sentences of the answer to question 143. Now in 143 he says that the branch representatives were elected by the branch members. There is no foundation for that. He goes on, [fol. 159] however, to say in his own branch as to what happened. On that he may or may not have personal knowledge. We may assume that perhaps he was present when this procedure transpired and that's how the representative of his own branch was selected. That laid no foundation for his knowing how the other representatives on the executive committee were chosen or selected or how they got there. I therefore move to strike all of that answer except the last sentence.

Hearing Officer: Motion is denied.

Counsel: I object to question No. 144 on the ground it is leading and suggestive in that the questioner instead of asking the witness who took part in the discussion or vote on any of the issues if any were raised at the meeting involved, instead asked particularly if David Hyun took part in the discussion. That was unnecessary and was not the proper way to ask the question and I object to it on that ground.

Hearing Officer: Objection is overruled.

Counsel: I move to strike all of that part of the answer to question 144 after the statement "At that meeting David Hyun did not voice any opinion" on the ground that it is absolutely and positively and unalterably nonresponsive to any question then before the witness. The question before the witness in question 144 was—Did David Hyun [fol. 160] take part in the discussion or vote on any issues or participate in the activities of that meeting, and he says "At that meeting David Hyun did not voice any opinion." He then goes on to say that—

> "we all listened to the recommendation which Henry Schmidt presented."

Then he goes on to say "After that I attended another meeting" and so on and so forth. He wasn't asked about any other meeting. He was asked about that particular meeting. The answer goes far beyond the question before the witness. This is important to note that you have to sustain these objections Mr. Bartos, because it is impossible to object to question—no, it is impossible rather to prevent answers getting in the record when there is no question before the witness which he is answering. A man can go on and make a long speech but if there is no question before him you can't possibly object to it before he gives the answer. As I understand, at least, there is a basic reason why an objection to an answer being nonresponsive has to be sustained. If this one doesn't go beyond the question that was asked then none of this deposition does.

Hearing Officer: Motion is denied.

Counsel: Is that on the ground, Mr. Bartos, that the answer is responsive to the question even though he says David Hyun did not participate in that meeting and then goes on to explain another meeting?

[fol. 161] Hearing Officer: It amplifies further statements that have been previously made in the record by the witness.

Counsel: The witness is not entitled, Mr. Bartos, to amplify further statements he has made. That's why the Examining Officer is there, to ask questions and to elicit specific answers. When the answer is given it's given. He then must wait for the next question to be asked. This isn't his hearing, or maybe Mr. Izuka thought it was. This is a Commissioner's hearing at which questions are asked and answers are given and when a witness gives an answer to a question that is not before him it must be stricken and I contend and respectfully submit that if this objection on this particular question is overruled that this Hearing Officer can be only biased and prejudiced and has no intention whatsoever of sustaining or listening in good faith to any of the objections which I have to make. If any objection has a real foundation this one has more than almost any other objection that I have made. I think the reasons you have given for *sustaining* the objections will show clearly on the record how erroneous the ruling is. It may estab-

lish also the basis for showing the reasons for some of the other rulings the Hearing Officer has made. I object to question——

Hearing Officer: Just one moment, Mr. Tyre, I didn't [fol. 162] sustain any objections. You made a motion to strike the answer and I denied the motion.

Counsel: Where in my statement I said that you failed to sustain the objection I meant to grant my motion. Failure to grant this motion is patent on its face as indicating the lack of the Hearing Officer's real understanding of these questions and your failure and refusal to really consider the basis for the objections and motions which I have been making. The record will obviously show that not a single objection has been sustained or a motion granted. It will remain, I take it, for a superior officer to determine whether or not there can be any basis for any objection that I made or any motion that I made. The Hearing Officer has thus far indicated that there can't be any basis for any of them. The record speaks for itself very loudly.

I object to question No. 145 on the ground that it too is leading and suggestive. The question asked whether or not David Hyun was present at any other executive board meeting instead of asking who was present at other meetings which he attended.

Hearing Officer: Objection is overruled.

Counsel: I move to strike all of that part of the answer to question 145, except the part in which the witness states that David Hyun was present at the meeting which he says [fol. 163] occurred some time in October, 1946, on the ground that all the rest of the answer is nonresponsive to the question. The question was simply did he attend any other executive board meeting of the Communist Party at which David Hyun was present. He could have answered that yes or no, but even conceding that after he said yes, he stated which meeting it was, he had no right under any rule that I know of to go on and tell us everything else that happened at the meeting until a proper foundation had been laid or at least a question was before him. This witness continually engages, it seems to me, in speeches rather than answers. I renew my motion to strike on the further ground besides those already stated, that the answer in any

event is irrelevant and immaterial and calls for hearsay, which is not binding upon David Hyun.

Hearing Officer: That motion is denied.

Counsel: I object to question 150 on the ground it is leading and suggestive.

Hearing Officer: Objection is overruled.

Counsel: I move to strike all of the answer to question 150, again a long speech of this witness, except that portion of the answer which states at the outset—"David Hyun was also interested in the activities of myself with Mr. Berman as to our support of the Democratic candidate." Everything after that I move to strike. The question before the [fol. 164] witness was simply was David Hyun also interested in this problem of the Democratic and Republican candidate, and the witness very directly states in the beginning of his answer:

> "David Hyun was also interested in the activities of myself with Mr. Berman as to our support of the Democratic candidate.

That answers the question. He isn't satisfied; he then goes on—

> "And after that meeting, during the meeting, after the discussion of the Democratic candidate . . ."

after that discussion about which the questioner asked him if David Hyun was interested—

> "we took up another matter, James Freeman's salary".

then a long discourse in which he brings in other names very gratuitously, and I might say, quite smearingly, and totally unnecessary to that answer. There are persons whose names are mentioned in there who might take notice of this and be a bit concerned about it. It had nothing to do with our hearing; it had nothing to do with us here. All I do know is that this answer simply is not responsive to the question before the witness. I move to strike the portions which I have already indicated. If this motion is denied then I think it is further evidence of the failure to con-

sider in good faith the objections and motions that are being made.

Hearing Officer: Motion is denied counsel.

[fol. 165] Counsel: I repeat then what I think it indicates. I think it indicates you are biased and prejudiced, Mr. Bartos; that you are not really considering what I am saying at all, but you are prepared to state from the outset that every motion I make is denied and every objection I make is overruled. I assume you have the power to make another ruling; I don't know; I assume that; I may be naive in doing so.

I object to question 151 on the ground that it is again leading and suggestive; on the further ground that it is vague and uncertain as to which particular meeting and which particular discussion the question refers to. Now in this long speech which I think ought to be stricken from this record which the witness makes in his answer to question 150, he talks an awful lot about a lot of things but not once does he mention that David Hyun participated in that discussion, not once, yet in the question 151, this Examining Officer had the pertinence to ask:

> "And as I understand it David Hyun was present at this executive board meeting and took part in these discussions, is that correct?"

If that isn't leading and suggestive what can possibly be, and I object to the question.

Hearing Officer: Objection is overruled.

Counsel: I object to question 154 as leading and sug-

[fol. 166] gestive. The questioner says:

> "As a matter of fact you knew that David Hyun represented the Punchbowl group of the Communist Party at this executive board meeting, is that correct?"

Not only is it leading and suggestive but also there has been no proper foundation laid for how this witness was competent to answer that question. Obviously it calls for his conclusion, and on these various grounds I object to the question.

Hearing Officer: Objection is overruled.

Counsel: I object to question 158 on the ground that I think it is pretty clearly not only leading and suggestive but it is quite vague and uncertain and calls for a conclusion of the witness and a speculative answer. How can any witness possibly say:

> "Would there be any reason why on the occasions that you would meet Mr. Hyun socially that he would not discuss party business with you?"

If there was such a reason presumably it's in Mr. Hyun's mind, and would be speculative at best, and it not only calls for a speculative answer but it is vague and uncertain as to what he is talking about at all, but in any event it is leading and suggestive.

Hearing Officer: Objection is overruled.

[fol. 167] Counsel: I move to strike the answer to question 158 on the ground that it is not responsive. The witness does not give an answer as to what the reason would be; he makes a surmise, which is all he could make, and speculates. Speculation has no part in evidence of the hearing in which the Commissioner desires or attempts to deport a man from the country of his residence for more than 27 years. Speculation has no place in such a hearing and that's all this answer is.

Hearing Officer: Motion is denied counsel.

Counsel: I object to question No. 161 on the ground it is leading and suggestive, vague and uncertain, and I believe calls for a conclusion of the witness.

> "Did you on any occasion talk with him as one communist to another?"

If that doesn't assume the very issue that this commission has to decide, this Commissioner has to decide and obviously the Attorney General, I don't know what other issues there could be. For those reasons I object to the question.

Hearing Officer: I think the question is proper. Objection is overruled.

Counsel: I move to strike the answer to question 161 on the ground that it is only an answer containing speculation, on the ground that it is not responsive to the question, that

it is particularly nonresponsive after the first clause. The [fol. 168] question is:

> "Did you on any occasion talk with him as one communist to another?"

He said "Oh yes, I have on many times, I talked to David Hyun"; he then goes on to give this alleged incident. He wasn't asked for the incident. He was merely asked for a yes or no answer but then again after he gives a yes or no answer he goes on to talk about something else. He does not specifically state that in this conversation he was talking as one communist to another, nor does he lay any basis or foundation for concluding that he was talking as one communist to another. How could he tell in what particular capacity he was talking or what particular capacity David Hyun was talking, if David Hyun did any talking in this particular incident. I think the answer must be stricken as being speculative, as well as irrelevant and immaterial and not responsive to the question.

Hearing Officer: That motion is denied. We will take a short recess. 1:45 p. m.

Recess.

I certify the foregoing to be a true and correct transcript of my stenographic notes, to the best of my ability, as contained in book 02006, and the recording made of the testimony taken in this case.

(S.) Norma Williams, Stenographer.

[fol. 169] By Hearing Officer: Hearing resumed and Solome G. Baum replaces Norma Williams as stenographer.

By Hearing Officer to Counsel: You may proceed, Mr. Tyre.

By Counsel to Hearing Officer: I object to Question 162 on the ground that this question is leading and suggestive and calls for conclusion of the witness. It will be noted in the answer to 161 that despite a rather lengthy answer by the witness who was quite capable of making his own description, he does not in any way, any shape or form state that this was a dispute within the Communist Party and it is, therefore, apparently incumbent upon the Examining

Officer to ask him in his direct question, "This was, as you describe it, a dispute within the Communist Party, is that right?" and then the answer is, the question and answer which I shall move to strike as soon as this objection is ruled upon. Leading and suggestive and calls for a conclusion of the witness.

By Hearing Officer to Counsel: This Question 162 appears to relate back to 161. Objection is overruled.

By Counsel to Hearing Officer: The trouble with that, if the Hearing Officer please, the question was already asked in 161 and the answer didn't give him an answer and there-
[fol. 170] fore he rephrased the question, this time in a leading and suggestive manner and that's precisely why the question is objectionable. It has not only been asked and already answered, but it has been answered in a way which didn't satisfy the questioner and therefore he put the question in a leading and suggestive form, precisely why I object to the question. I now move to strike the answer to Question 162 as not being responsive to the question.

By Hearing Officer to Counsel: Motion is denied.

By Counsel to Hearing Officer: Object to Question 163 on the ground that it has twice been asked and twice more or less answered and also on the ground that it is leading and suggestive.

By Hearing Officer to Counsel: Objection overruled.

By Counsel to Hearing Officer: Object to Question 164 because it has already been asked, I think now three times, and answered three times.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: I move to strike the answer to Question 164, first on the ground that it states conclusions of the witness without any proper foundation. He says that it was understood clearly that it was a discussion among the party members because there were no outside members involved in it. He doesn't state upon what the
[fol. 171] understanding was based and, as a matter of fact, in his next statement he states specifically that David Hyun was representing the union for reinstatement. Therefore, obviously it is inevitable if it's true that David Hyun was representing the union for reinstatement that he had to be present as the union representative and the wit-

ness doesn't state and the questioner never asked what the foundation is for the conclusion that David Hyun was not acting as the union representative for reinstatement in these discussions, but rather was acting apart from his union representation as a member of the Communist Party. The answer clearly belies any possibility that, any reasonable possibility for relevance to the question which is being asked. It is obvious that the answer is based upon conclusions and hearsay and in itself is inconsistent with the previous answers that the witness has made. I move that it be stricken and also move to strike it on the ground that it is not responsive to the question. The question is a simple one, "Is that correct?" It could be yes or no. He then goes on again to state something beyond the question that was asked.

By Hearing Officer to Counsel: Motion is denied.

By Counsel to Hearing Officer: Question 165, Mr. Bartos, is a very interesting one; but for the fact that there is a question mark at the end of it, I would have no way of knowing that it was a question. I would have thought that this [fol. 172] was introduced testimony. I have to object to it. It is patently leading and suggestive and has already been asked and answered now I think four times. He says that the "motivation behind this was the fact that Abe, Carol Abe, was a member of the Communist Party as well as yourself and Hyun and Hall and the other people who took part in this discussion, is that correct?" Now if that's a proper question I just better go back to law school and learn what's right and what's wrong. These are typical questions, if I might say, of cross-examination. These are the kind of questions that the opposing counsel can ask, try to argue with the witness, trying to get the witness to say things that the cross examining counsel wants. But this is not a cross-examining counsel. This is the prosecution. This is the Government's own witness. You can't put words in the witness' mouth, especially a witness which is testifying on the very crucial and significant matter that involves David Hyun remaining in this country. That just hasn't bothered the Examining Officer. He just goes ahead and asks all the leading questions he wants. He summarizes it and then asks the witness to say yes, that's cor-

rect. That's precisely what he has done in this particular question, that is 165 which has a question mark at the end of it.

By Hearing Officer to Counsel: Objection is overruled.

[fol. 173] By Counsel to Hearing Officer: Object to Question 166 on the ground that it is irrelevant and immaterial and calls for hearsay not binding upon David Hyun. It doesn't matter in this particular proceeding from whom Mr. Izuka first obtained his instructions regarding party aims and policies.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: And after reading the answer to Question 166, I renew my objection to Question 166 on the ground that it is now apparent that there is no relationship between the question that was asked and the answer that was given to David Hyun or to any issue in these proceedings.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: I move to—before that, I object to Question 167 on the ground that the question is irrelevant and immaterial to any issues in this case.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: I move to strike all of 167's answer except the first word "yes" on the ground that it is not responsive to the question as put to the witness and on the ground that it states conclusions and is replete [fol. 174] with hearsay not binding upon the *witnes*. The question was a simple one, "Did you on any occasion attend a school where your communist background could be broadened?" In the first place the question calls for a conclusion but if he can answer it, it can be answered "Yes" or "No". He answers it yes and then in the witness' typical fashion, without any objection of course from the counsel who was present, he goes on to another little speech. Again I must repeat that it is most difficult to prevent this sort of answer from getting in unless there is a question before the witness to which an objection can be placed. Therefore, again renew the motion to strike all of that answer to 167 except the word yes on the ground that it is not responsive to the question and on the other grounds I have already stated.

By Hearing Officer to Counsel: The motion is denied.

By Counsel to Hearing Officer: I object to Question No. 168 on the ground that it is irrelevant and immaterial and calls for hearsay not binding upon David Hyun.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: The same objection to Question 170.

By Hearing Officer to Counsel: One hundred and what?

By Counsel to Hearing Officer: 170.

[fol. 175] By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: The same objection to Question 171. I want to call the Hearing Officer's attention that these questions are referring back to 1938.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: Object to Question 172 on the same ground.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: Object to Question 173 to which the questioner is now asking whether the Communist Party in the Territory of Hawaii was a part of the next higher body. Object to this question on the ground that no proper foundation has yet been laid for this witness to be competent to answer that question and it therefore calls for a conclusion of the witness and is also irrelevant and immaterial to the issues before the commission at this time, in 1951.

By Examining Officer to Counsel: It seems to me that the Question No. 173 has its foundation in the prior questions and answers of the witness wherein the witness states that [fol. 176] he received instruction in the organization of the Communist Party and Question 173 refers to that instruction in regard to the organizational structure.

By Counsel: His teaching, however, that he received in the first place is a little archaic at the time that we are concerned with and in the second place, it was given by persons whose ability and qualifications have not yet in this hearing been established to give such instructions.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: Move to strike the answer to Question 173 on the ground that it states conclusions of the witness and hearsay not binding on David Hyun and

on the further ground that the statements therein contained are irrelevant and immaterial to the issues in this case.

By Hearing Officer to Counsel: Motion is denied.

By Counsel to Hearing Officer: Object to question 176 on the ground that clearly no foundation has been laid to the question as to this witness being competent to answer it and on the ground that it calls for a conclusion of the witness and it calls for only hearsay.

By Hearing Officer to Counsel: Objection is overruled.

[fol. 177] By Counsel to Hearing Officer: I withdraw my objection to that question. I do believe that the question could be answered yes or not and then the question after that would be the one to object to. I will withdraw the objection to question 176. I wish, however, to move to strike the answer to Question 176 on the ground that it is not responsive and further contains hearsay and conclusions of the witness. The question was simply "To your knowledge did correspondence or other communication come from the California executive committee or go back from Hawaii to the California Executive Committee?" and admittedly so far in this hearing there is no evidence that he was a member of either committee or participated himself in the correspondence. Now he might have personal knowledge of it since he may have seen it go out or seen it come in. However, the question should be answered either yes or no and he does not answer it with a yes or no and, therefore, the question is not responsive and the statements which he makes are hearsay and conclusions since he does not state that he has personal knowledge. He merely says what was told to him. He doesn't even say who told it to him, not that that would matter because it would still be hearsay and not binding upon David Hyun and I therefore move to strike the answer.

By Hearing Officer to Counsel: Motion is denied.

By Counsel to Hearing Officer: Object to Question 177

[fol. 178] on the ground that it is leading and suggestive, assuming facts not in evidence or not properly in evidence, and calls for a conclusion of the witness, and no proper foundation has been laid to indicate or show the witness is competent to answer the question.

By Hearing Officer to Counsel: Motion is denied.

By Counsel to Hearing Officer: I object to Question 178. This question states "How was communication carried on between the California Party and the Hawaii Party?" There is nothing in this record to show that this witness is competent to answer that question, nothing in the record yet to show that he either received or sent any of the correspondence, or that he wrote any of it or that he made any records of it or had anything to do with it, made any entries with regard to it, nothing in the record whatsoever to show that he had any personal knowledge of any aspect, of any correspondence, if any existed, between the California Party and the Hawaii Party to use the language of the question. It is, therefore, obvious to me and objection is made to the question on this ground, that no proper foundation has been laid and it calls for the conclusion of the witness.

By Examining Officer: It seems to me this question still refers to his previous testimony regarding what he was taught and what instructions he received regarding the organization of the Communist Party in Hawaii.

[fol. 179] By Counsel to Examining Officer: If I may point out to Mr. Broffman, the only questions heretofore are in regard to education, his instructions of organization, precisely what the witness says in the answer to 172. He "gave us the instructions of organization of the Communist Party". Now what relationship there is between structure of organization and the method by which the correspondence is carried, whether by mail or courier or any other way, I can't see. I don't think that he obviously laid a foundation for the answer to that. It is also immaterial for the reason that it is not pertinent to the issues before this hearing at this time.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: Move to strike the answer to Question 178 on the ground that it is not responsive in that the witness was asked how communications was carried on and then he answers by saying that our members understood that important matters should not go by mail but should be carried through by couriers working on the ship and that's how the Communist Party of Hawaii and the party in California had correspondence. It is there-

fore evident that the witness is giving his answer based upon what his members understood, how they understood that, what the instructions were, who gave them, whether the person who gave it was qualified to give it is not set [fol. 180] forth by the witness in the deposition. Therefore, I move to strike the answer as it is not responsive and is stating conclusions and hearsay.

By Hearing Officer to Counsel: Motion is denied.

By Counsel to Hearing Officer: I move to strike all of the answer to Question 179 except the word "Yes", first on the ground that the balance of the answer except for the word "Yes" is not responsive to the question. In typical fashion again the witness goes on with speech. The question was simple, required a yes or no answer, "Do you know of your own knowledge what distribution was made of the funds paid in dues by the members in the territory of Hawaii?" It can be answered yes or no and he answered it "Yes" and then goes on to state a good deal of other things concerning dues. Not only is it non-responsive beyond the word "Yes" and therefore the whole answer except "Yes" must be stricken, but the witness also sets forth certain parts of his answer in which there is contained hearsay, matters which were not beyond his own personal knowledge or observation, jumps to certain conclusions, certain surmises, makes certain speculations, which cannot be part of this hearing, especially since there was no particular question before the witness at this time. I make a separate motion in addition to striking all of the answer except the word "Yes" that if that motion is denied, then to strike those portions of the answer which do not contain statements of fact within the witness' own knowledge or ob- [fol. 181] servation and for which no proper foundation has been laid. For example, the witness states, "I was further told that the Waikiki branch should retain 20 percent of the dues and 80 percent should be sent to the Territorial treasurer of the Communist Party." Now I don't know who told that to him and whoever did tell it to him, I don't know whether or not he was qualified to know. This is hearsay. This isn't matter within his own knowledge and what Dr. Reinecke did with the dues again is a matter of which he himself has no personal knowledge about. He

doesn't say Dr. Reinecke told him this or that he saw Dr. Reinecke do what he did if Dr. Reinecke did anything. He doesn't state that he was the treasurer of the Communist Party in Hawaii or that he had such an office that he would have personal knowledge. No foundation laid to qualify this witness can answer the question as to what distribution was made of the funds paid in dues if that question had been before the witness which, of course, it was not. I think that summarizes my argument in favor of the motion to strike the answer, both motions.

By Examining Officer: I think the following question, No. 180, and the answer thereto shows the base of the witness' knowledge to Question No. 179. Also the answer to Question 181 shows the basis of the witness' knowledge. Apparently what happened here was that in responding to 179 the witness took off quite a bite and since neither the respondent nor counsel was there, he digested that and then in the [fol. 182] following questions the Examining Officer showed the basis of the knowledge to the answer to Question 179. Even referring to questions after that, Questions 182 and 183, further serve as a basis for the answer to Question 179.

By Counsel: Of course, again we are going into what the Hearing Officer has reprimanded us for and that is trying to ascertain whether or not a question is proper or an answer is proper or improper by looking to see what happened after that. However, since you have done it I shall follow through. I see nothing in what comes after which in any way helps the answer to 179. You mention the answer to 180 which indicates that he was told these things. He was asked "Who told you these things?" He doesn't say. All he says is a report was made in the branch committee by Jack Hall. He doesn't say which branch committee. He doesn't say when the report was made and he doesn't say whether he was present when Jack Hall made such a report, if he made such a report, but he does say "and I listened to Kimoto on the allotment of the dues, how the dues should be divided among all the nation's branches", which doesn't in any way reflect upon the distribution of funds made—distribution of funds paid in dues by members of Territory of Hawaii and furthermore, he doesn't say what Kimoto actually told him as to such allotment. Of

course, the answer to Question 181 is an answer to a leading and suggestive question, which we'll get to when we finish this particular answer and the argument on it. But even there [fol. 183] in the answer to 181, that doesn't help us any in any way to know how the monies are distributed because in 181 he again fills the answer with hearsay and with statements which are not material to the question as to how the funds are distributed between the United States and Hawaii or even between branches or parts of the Communist Party in Hawaii. Now the answer to 182 again is an answer to a leading and suggestive question. 183 is a summary, not by the witness incidentally but by the Examining Officer. The same is true of 184. I see nothing in anything that follows, Mr. Broffman, which in any way helps to make the answer to 179 admissible.

By Examining Officer: Well, then we probably read it differently. As I read it, the questions immediately following 179 show the source of the witness' knowledge as to the distribution made of the funds paid in dues.

By Counsel: He said Mr. Hall made a report. He doesn't say he heard it. Then he says he listened to Kimoto on the allotment of the dues. Now I don't know what Kimoto said, don't know if Kimoto is qualified to say it, I don't know when he said it or where he said it, but assume that he said it sometime and sometime shortly before this man removed himself from the party. Still all it is is Kimoto said how the dues should be divided. That isn't in any way helpful to answer the question, "Do you know of your own knowledge what distribution was made of the funds." [fol. 184] I'm not interested in what the instructions were or theoretically how it was supposed to happen, but what actually did happen, and he hasn't stated that he knows of his own knowledge what actually did happen and, in fact, the answer to 179 and the several answers which follow to the several respective questions which follow show that he had no personal knowledge of what actual distribution or allocation was made of the funds collected by the Communist Party in Hawaii.

By Examining Officer: Well, look at the answer to Question 181.

By Hearing Officer to Counsel: Well, disregarding the

argument concerning questions after the answer to Question 179, the record shows that this witness was schooled in organization in the Communist Party and that he was the secretary and treasurer of the Waikiki Branch of the Communist Party. Both of counsel's motions regarding that answer are denied. Proceed, Mr. Tyre.

By Counsel to Hearing Officer: I object to Question 180 on the ground that it is also hearsay.

By Hearing Officer to Counsel: Overruled.

By Counsel to Hearing Officer: Move to strike the answer to Question 180 on the ground that it is not responsive to [fol. 185] the question which was asked and the answer which was elicited is irrelevant and immaterial to the issues at hand.

By Hearing Officer to Counsel: Well, it appears relevant to show that the witness was a member of the Communist Party and how he got his instructions. Motion is denied.

By Counsel to Hearing Officer: Object to 181 on the ground that it is leading and suggestive. The Examining Officer could easily have asked the witness when he heard Kimoto make this statement about allotment of the dues. Rather than that he puts words in the witness' mouth by telling him this was part of the basic instruction he received as the cell treasurer of the Waikiki cell. Also it assumes a fact not in evidence that he ever received instructions as the cell treasurer. At least I don't recall any evidence to that effect. The only instructions he received was in 1938. I don't know whether he was treasurer at that time or not. He hasn't testified that he was.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: Move to strike all that part of the answer to 181 except the word "yes". The question was, was this "part of the basic instruction you received as the cell treasurer of the Waikiki cell." The answer could have been yes or no. After stating "Yes" he [fol. 186] then goes on to a long dissertation about matters far beyond the question which was asked and containing hearsay and conclusions and which isn't yet relevant or material to the issue of whether or not there is any tie-in between the Communist Party of Hawaii and the Communist Party of the United States. No matter what the distribu-

tion of dues among those portions of the Communist Party of Hawaii, that doesn't yet show the relationship between the Communist Party of Hawaii and the Communist Party of the United States. That is extremely material, that particular issue, to the issues in this case. This answer doesn't bear upon that at all even if the answer were a proper one, properly stated in answer to the question.

By Hearing Officer to Counsel: Motion is denied.

By Counsel to Hearing Officer: Move—I object to Question 182 on the ground, on these grounds: 1. *it* assumes a fact still not in evidence, namely that this witness received any indoctrination as treasurer or while he was treasurer of the Waikiki Branch; on the further ground that the question is obviously misleading and suggestive; and on the further ground that it is almost precisely the same question that was asked in 181 and already answered or purported answered in 181.

By Hearing Officer to Counsel: Objection is overruled.

[fol. 187] By Counsel to Hearing Officer:

Object to Question 183. Witness is asked if he can state definitely from his own knowledge, *from his own knowledge*, that the local branch gave a certain portion of its dues to the state branches which in turn transmitted a portion of those funds to the national branch? Object to this question on the ground, first, that it is leading and suggestive; that it calls for conclusions of the witness; no proper foundation has yet been laid to this witness to indicate that he is a competent witness to answer such a question; and finally on the ground that the question is compound, asking two questions in one.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: Question 184 referring to the transmission of dues says, "That was common knowledge to all members of the Communist Party" and then the questioner forgot that he wasn't testifying and said "is that correct?" This is the Government's own witness. Now I can see that once in a while the Examining Officer may forget whether he is examining the other side's witness or his own witness. He should remember at this point. It is obvious that this question is leading and suggestive.

There is no foundation laid as to how he could possibly know what was common knowledge for all members of the Communist Party. He doesn't state and it is, therefore, vague and uncertain as to whether he means the Communist [fol. 188] Party in the United States, the Communist Party in Hawaii, or the members of the Communist Party of the branch of which the witness was a member or purportedly a member, or the branch of which David Hyun was a member or of which Communist Party he was referring to. For all those reasons and any one of them I believe the question should be objectionable and I therefore object on each and all of those grounds.

By Hearing Officer to Counsel: Objection is overruled.

By Counsel to Hearing Officer: I would at this time move the Hearing Officer to continue this matter until a convenient hour tomorrow which I understand would be 10:00 A.M.

By Hearing Officer to Counsel:

Q. You mean then, counsel, you are motioning for a recess until 10:00 A.M. tomorrow morning due to the lateness of the hour?

A. Yes.

By Hearing Officer to Examining Officer:

Q. Have you any objection, Mr. Broffman?

A. I have no objection.

By Hearing Officer to All Persons Present:

This hearing is recessed until 10:00 A.M. tomorrow, March 29, 1951, and all persons are notified to be present at that time without further notification. Hearing is recessed.

By Examining Officer:

[fol. 189] I would like to state just for correction of the record of Mr. Tyre's statement at the beginning of this hearing, that in regard to these cross-interrogatories that I did not speak to Mr. Tyre by telephone at any time, but on the following telephone calls to his office, the girl in his office told me that Mr. Tyre would like to have David Hyun brought to Los Angeles and I told her that the matter

would be taken up with Mr. Landon and I heard nothing more about it after that although I understand from Mr. Tyre that he subsequently wrote Mr. Landon.

By Counsel: That's correct. I misstated when I said I had spoken directly to Mr. Broffman. Actually I had spoken to him through my secretary.

By Hearing Officer to Examining Officer and Counsel: Well, apparently, Mr. Tyre and Mr Broffman at some time or another in the past have spoken over the telephone and I allowed counsel on March 13th ten business days within which to go over the deposition and formulate any cross-interrogatories he may wish to prepare and that the respondent might familiarize himself with the depositions.

Now the hearing is recessed until 10:00 A.M. March 29, 1951, and all persons are notified to be present at that time. Hearing is recessed.

I certify that the foregoing is a true and correct transcript of the testimony in this case as transcribed from my [fol. 190] stenographic notes (Bk. No. 01995) and the recording made by Distaphone.

(S.) Salome G. Baum, Stenographer.

[fol. 191] Immigration and Naturalization Service

Transcript of Hearing—March 29, 1951

By Hearing Officer: Resumed Hearing in Deportation Proceedings in the case of David Hyun—A3 611 569.

Place of Hearing: Los Angeles, California.

Persons Present: John B. Bartos, Hearing Officer; Sidney Broffman, Examining Officer; Norma Williams, Replacing Salome Baum as stenographer; Milton S. Tyre, counsel for respondent; David Hyun, respondent.

Record by Stenographer and Dictaphone

Hearing Officer to Counsel: You may proceed, Mr. Tyre.

Counsel: I move to strike the answer to question 185, particularly that portion of the answer following the first word of the answer, namely the word "Yes". Question 185 calls for a yes or a no answer. The witness as per

usual answers it Yes and then goes on in a long discourse which may or may not be related to a subsequent question which the questioner might have asked but had at that time at least not yet asked. I move to strike the question on the further ground that matters stated in the answer to question 185 contain conclusions of the witness, hearsay of the witness, not binding upon David Hyun, and no founda-
[fol. 192] tion laid for many of the statements contained in the answer to question 185.

Hearing Officer: Counsel in your motion, you made two motions and in your second motion you move to strike question. Did you mean the answer or the question.

Counsel: I meant to say the answer to the question 185 and particularly that part of the answer following the first word "Yes".

Hearing Officer: Motion is denied

Counsel: I am not sure, I think I stated, if I didn't I meant to state it as the further ground that the answer was nonresponsive to any question after the first word "Yes" Is the decision any different on that ground?

Hearing Officer: No, the motion is denied.

Counsel: The motion is still denied, do I understand it?

Hearing Officer: Yes, sir.

Counsel: I object to question No. 186 on the ground that no proper foundation has been laid for the question and that the question calls for a conclusion of the witness and for hearsay not binding upon David Hyun and calls for a speculative answer.

Hearing Officer: Objection is overruled.

Counsel:

[fol. 193] I move to strike the answer to question 186 on the ground that it was not responsive, particularly after the first word "Yes". There was no question after the witness answered the word "yes" which he was required thereafter to answer. Furthermore, the statements contained in the answer to 186 are replete again with conclusions of the witness and hearsay testimony and evidence which is not binding upon David Hyun and contains many statements which are speculative.

Hearing Officer: Motion is denied.

Counsel: I object to question 189 on the ground that the question does not call for the best evidence. The best evidence in the case is the original card itself, and not the testimony at the time this deposition was taken of the witness as to what the card stated. That I believe discards the rule of evidence also Mr. Bartos. There is no testimony in the record that that card was not available or it could not have been produced. Until such evidence is made available and indicated on the record you cannot permit secondary testimony as to what was contained in the original piece of evidence, namely the card itself, if ever it existed. Therefore I summarize by saying I again object to the question on the ground it does not call for the best evidence.

Hearing Officer: Objection is overruled.

Counsel: I object to question 190 on the ground that the [fol. 194] question has already been asked and it has been answered and I suspect very very severely, Mr. Bartos, that when the witness answered that he was a member of the Communist Party of Hawaii that this displeased the questioner no end and he purposely stated "Of Hawaii?" indicating that it certainly must be something other than just Hawaii. Now the question was clear and the answer was clear, yet the questioner has the nerve to go ahead and ask the question again when it has already been clearly asked and clearly answered. I think it is not only objectionable on that ground but I object to it on the further ground that it is therefore leading and suggestive.

Hearing Officer: Overruled.

Counsel: I object to question 191 on the ground that it too has already been asked and answered; on the further ground that it is leading and suggestive; and on the further ground that it does not call for the best evidence, the best evidence of course being the original card itself to find out what was printed on it; no proper foundation laid for requiring secondary evidence.

Hearing Officer: It is overruled.

Counsel: I object to question No. 192 on the ground that no proper foundation has been laid for the question whatsoever, which calls for a conclusion of the witness, completely speculative, and calls for an opinion which is beyond

[fol. 195] the realm of this witness to answer. The question, in case you have not read it Mr. Hearing Officer, is—

> "Did all the other members in the Territory, to the best of your knowledge, have like or similar cards?"

The answer is—

> "Oh they all had the same cards".

Now how in heaven's name, would this witness know if they all had the same cards? What question has been asked of this witness yet to qualify him to answer a question as to what all the other communist members of the party in the Territory had with respect to their cards or whether they even had cards. If that question is proper why I will repeat just about everything I said yesterday concerning the Hearing Officer as to bias and prejudice. This is to point out, I hope without prejudice to the ruling which you may make on my objection, of course.

Hearing Officer: Well counsel, this man, this witness that was testifying, testified he was thoroughly schooled in the Communist Party organization and he was secretary and treasurer of the branch to which he belonged. Your objection is overruled.

Counsel: I object to the question on the further ground that again it does not call for the best evidence, the best evidence being the cards themselves, and the second evidence being a witness who owned such cards testifying as to what was on them. For some reason they could not [fol. 196] find the cards. I want to object to it on that further ground.

Hearing Officer: Overruled.

Counsel: I might state also, Mr. Bartos, that this man could be the most educated person in the world on communism and the Communist Party of Hawaii, but that doesn't lay any foundation for his testifying as to what actually was printed on a card in the possession of a person when he doesn't ever testify that he had seen that card or that he had distributed that card or that he had talked to the person who possessed that card. Now it may well have been a part of the theoretical education that he learned

some 12 years earlier that such cards were supposed to exist and supposed to be distributed, but that is a long way from saying that they actually were distributed and that every member of the Communist Party in the Territory had such cards. If the ruling of the Hearing Officer is based upon the education he had 12 years earlier, I submit that it is on its face very obvious that the ruling is completely in error.

Hearing Officer: Objection is overruled.

Counsel: I move now into the afternoon session of the 18th of December, 1950. We are still examining Ichiro Izuka. I object to question 194 on the ground that no proper foundation has been laid. The questioner asked the witness who the members are of the executive board of the Com- [fol. 197] munist Party of Hawaii. The witness has never yet testified that he was a member of the executive board of the party of Hawaii or that he was present at all the meetings. I object to the question further on the ground that it is not stated as to which particular time is intended by the question, and the question is speculative and could be irrelevant and immaterial as to the issues in the case at this time. Also it is irrelevant and immaterial in any event. I'll withdraw that.

Hearing Officer: Objection is overruled.

Counsel: I object to question 197 on the ground that the question has already been asked and answered, no proper foundation is laid; in any event it calls for a conclusion of the witness and hearsay not binding upon David Hyun.

Hearing Officer: It is overruled.

Counsel: I move to strike the answer to question 197 on the ground that the answer itself contains conclusions of the witness and hearsay of the witness not binding upon David Hyun. Particularly I move to strike that portion of the answer which reads—

> "Jack Kimoto was sent to Hawaii in 1938 when the Communist Party requested a leader to develop party members in Hawaii. He was the man in 1938 in charge of all the organizational activity in the Territory of Hawaii."

[fol. 198] Hearing Officer: Motion is denied.

Counsel: I object to question No. 198 on the ground that it's irrelevant and immaterial and no proper foundation has been laid.

Hearing Officer: Overruled.

Counsel: I object to question 199 on the ground that it is irrelevant and immaterial and no proper foundation has been laid.

Hearing Officer: Overruled.

Counsel: I move to strike the answer to question 199 on the ground that it contains only conclusions and hearsay by the witness, which is not binding—this hearsay is not binding upon David Hyun.

Hearing Officer: Denied.

Counsel: I make the same objection to question 200 that I made to the question 199 and for the same reasons.

Hearing Officer: Overruled.

Counsel: I make the same objection for the same reason to question No. 201.

Hearing Officer: Overruled.

Counsel: Same objection to question 202 for the same reason.

[fol. 199] Hearing Officer: Overruled.

Counsel: I object to questions 203, 204, 205, all of which are identification questions, similar in nature to the previous ones and I object to them on the same grounds that I objected to question 199, also an identification question. I presume the ruling would be the same. If the Hearing Officer wishes I can make objection independent of each of those questions.

Hearing Officer: The objection is overruled as to all three questions.

Counsel: I object to question 207 on the ground it is leading and suggestive and also calls for a conclusion of the witness.

Hearing Officer: Overruled.

Counsel: I move to strike the answer to question 207 on the ground it is not responsive.

Hearing Officer: Denied.

Counsel: I object to question 208 on the ground that it is leading and suggestive. The questioner asked, "Did he," referring to Easter J. Doyle, "belong to the same cell that

you belonged to". Now if the questioner wanted to ask the question properly he could have asked which cell if any.

Hearing Officer: Overruled.

[fol. 200] Counsel: I move to strike the answer to question 208 after the word "Yes." The question 208 calls for a yes or no answer——

> "Did he belong to the same cell that you belonged to?".

The witness answered "Yes . . ." What he said thereafter is not responsive to the question; therefore I move to strike it on the ground; on the further ground that the statement following the word "Yes" contains conclusion and hearsay of the witness, not binding upon the respondent David Hyun. In fact I would wish to amend my motion and move to strike the entire answer including the word "Yes" in that the explanation of the word "yes" shows that the answer is based upon a conclusion and hearsay and is not a direct answer to the question itself. Therefore, the entire answer is nonresponsive and is hearsay.

Hearing Officer: Denied.

Counsel: I object to question 212 on the ground that it's leading and suggestive and has already been asked and answered. I don't know where the Examining Officer in this case got the idea at Honolulu that he has the right to summarize testimony any time he likes and in the language which he prefers and then ask the witness to answer yes or no, but wherever he got such ideas he uses them quite frequently in violation of all rules that I know, probably in violation of rules which I presume he knows.

Hearing Officer: Denied.

[fol. 201] Counsel: We now move to the testimony of Easter J. Doyle, which starts at page 33 of the deposition. I wish to object to question 241 on the ground that no proper foundation has been laid; the question calls for a conclusion of the witness as to what was the purpose of the meeting and discussion.

Hearing Officer: It is overruled.

Counsel: I move to strike the answer to question 241 on the ground that it is not responsive. He was asked what

was the purpose of the meeting and discussion, and he said, to his understanding he says what he thought it was. He doesn't say that that was the purpose; therefore, it is not responsive to the question and I move to strike it, that is the answer.

Hearing Officer: Denied.

Counsel: I object to question 242 on the ground first of all it is leading and suggestive; on the further ground that it has already been asked and answered. It is again an example of the questioner's summarizing in the language which he prefers, then having the witness give a yes or no answer. I object to the question on those grounds.

Hearing Officer: Overruled.

Counsel: I move to strike the answer to 242 on the ground that it is not responsive. I of course make these remarks [fol. 202] for the record well realizing by now, Mr. Hearing Officer, that none of my objections will be sustained or motions granted, but I must state for the record in order to protect my position.

Question 242 asks this question:

> "Do I understand you correctly that David Hyun approached you to attend discussion groups which were designed for the orientation of recruits into the Communist Party, is that correct?"

The question is thus asking whether that was the nature and character of the discussion groups which he was asked to attend, and the answer merely says——

> "I think that's what his intentions were."

which was not in answer to the question, namely what was the character and nature of the discussion groups. I am taking the liberty of explaining in great detail why I believe this question is not responsive and I make my motion to strike on that ground.

Hearing Officer: Denied.

Counsel: I object to the question 243 on the ground that it calls for a conclusion of the witness, it's irrelevant and immaterial and calls for speculation. The question asked—

> "What caused you to think that these were his intentions?"

That is immaterial as to what caused him to think it. It is what David Hyun said and what David Hyun did that [fol. 203] counts, not what may have been working in the mind of this witness to indicate that in his own mind this was the intention of David Hyun.

Hearing Officer: I think it's a foundational question. Overruled.

Counsel: All right. In that case I take it you mean by foundational that it is subject to being tied in later with something that will make it material. We now have the answer to that question 243 and his answer is this: The question was:

> "What caused you to think that these were his intentions?"

Now he answers—

> "Well the other people who had attended meetings and were members of the Local 150 group had told me that; as a matter of fact, the meetings up there were dry, and they were members of the Communist Party as such.

In view of that answer I now renew my objection to question 243 and I move to strike the answer—I renew my objection at this time to question 243 on the ground that the question has now by the answer to it indicated that it cannot be tied in in any proper way to the issues in this case, and if it had any foundation that foundation has now been wiped out.

Hearing Officer: Objection overruled; motion is denied. [fol. 204] Counsel: I had not yet made a formal motion but I will make it to strike the answer to question 243 on the ground that it is not responsive and contains conclusions of the witness.

Hearing Officer: I understood that you made a motion that the answer be stricken and objected further to the question.

Counsel: Well then I separated it so there wouldn't be any confusion. However, I take it that the motion to strike the answer to question 243 has been denied.

Hearing Officer: You have renewed the motion:

Counsel: Yes.

Hearing Officer: Motion is denied.

Counsel: Question 244, the witness was asked and I quote the exact question:

"Did you attend any of these meetings?"

and I now read the answer to 244 that the witness himself gave, to wit:

"No, I did not."

I now therefore, in some expectations, renew my objections to question 242 in which the questioner asked this witness what the nature of those meetings were which the witness did not attend. I renew my motion to strike the answer to 241 in which the witness states what he thought [fol. 205] was the purpose of the meetings which he did not attend. I also renew my motion to strike the answer to 243 in which he states what he thought Mr. Hyun's intentions were and in which he states what the character of those meetings were which he himself did not attend. He admits that he was not present at these meetings referred to in questions 241, 242 and 243. I think that nothing could be more patent than that my renewal of my objection to question 242 and renewal of my motion to strike the answers to 241, 242 and 243, must be granted.

Hearing Officer: In the light of the witness' testimony that he did not attend those meetings it is self evident that he doesn't know what kind of meetings they were or what went on there and I think that that is self evident and should be considered in that light.

Counsel: I take it then that my objections are granted at this time and motions are also granted?

Hearing Officer: I think the whole thing should stand there; it is evident that the witness didn't know what kind of meetings they were. For that reason I am going to overrule the objections and deny the motions, and I tell you frankly it will be considered in that light by myself that he doesn't know what kind of meetings they were; he didn't attend them.

[fol. 206] Counsel: I object to question 245 on the ground that no proper foundation has been laid for the question; that it calls for a conclusion of the witness and is leading and suggestive. This question is the ultimate question which must be decided by this Hearing Officer, by the Commissioner or the Board of Immigration Appeals, by the Attorney General and by whatever courts may perhaps later have to decide the question involved in this case—was David Hyun a member of the Communist Party? This is the ultimate question to be decided and this is the question which is asked of this witness, for which no proper foundation has been laid even if the question were otherwise answered. I therefore must object to this question on the grounds stated.

Hearing Officer: Overruled.

Counsel: I move to strike the second sentence of the answer to question 245 on the ground that it is not responsive; it is not in answer to any question before the witness; on the further ground that the second sentence of the answer states the conclusion of the witness, for which as yet no proper foundation has been laid. The question is a simple one, although it calls for the greatest of speculation. The question was:

> "Did David Hyun talk to you as a member of the Communist Party?"

[fol. 207] The answer was "No, not at the time." He then goes on to state something further and different after he has already answered the question at a time when there was no question before him. I move to strike the second sentence on the grounds stated.

Hearing Officer: That second sentence seems to me to be in favor of David Hyun. This witness says that he didn't know whether David Hyun was a communist or not. I am going to deny your motion counsel.

Counsel: He already said in the first sentence "No." I am satisfied, Mr. Hearing Officer that I am representing David Hyun fairly well. The second sentence is speculative. I don't care whether it helps him or hurts him. The thing is that I only want evidence in this record which is evidence, not a bunch of speculation, not a bunch of opinions

without proper foundation laid and I very much resent witnesses giving speeches or answers when there is no question before the witness.

Hearing Officer: Motion is denied.

Counsel: I object to question 246 on the ground that it is irrelevant and immaterial; on the ground that the question calls for a conclusion of the witness; on the ground that no proper foundation has been laid; on the ground that the question is leading and suggestive. I think that is adequate.

[fol. 208] Hearing Officer: Overruled.

Counsel: I object to question 247 on the ground that this question too is leading and suggestive; on the further ground that it assumes a fact not in evidence, namely that David Hyun was closely associated with these members. This is a question which is being asked, not an answer which is being given. All the witness said was it was his belief that David Hyun may have been talking as a Communist. Why? Because in the answer to 245—

> ". . . because of his affiliations with the workers of the union who worked at the union office, who . . . "

according to the witness "were also members of the Communist Party." That's all he stated. He hasn't said there that David Hyun was closely associated with these people or that he was even associated with them, and yet of course the witness puts those words in his question and is virtually asking the witness to answer yes or no and the witness does answer yes or no. The question I think is clearly an example of a leading and suggestive question. I object to it on that ground and other grounds already stated.

Hearing Officer: Overruled.

Counsel: I object to question 251. I don't know how long it takes the Examining Officer in Honolulu to wake up, but he is still questioning this witness about these meet-[fol. 209] ings and discussions, which the witness stated in the answer to question 244 that he never attended. Now that we know that, having passed the answer to 244, it seems to me, Mr. Hearing Officer, that we can intelligently

make rulings on the questions which are following question 244 and the answer thereto.

In question 251 the questioner is asking this witness whether he now knows or has any idea as to what the meetings or discussions concerned which he himself did not attend. I submit that this calls for a conclusion of the witness and can only be based upon hearsay which cannot be binding in a hearing of this type upon David Hyun. I object to this question on those grounds.

Hearing Officer: Overruled.

Counsel: I object to question 252 on the same ground on which I object to 251.

Hearing Officer: Overruled.

Counsel: I move to strike the answer to question 252 in which the witness states what he understood the meetings concerned; and also the answer to question 253 in the same motion, in which answer he states how he subsequently learned the purpose of these meetings, not by being told by David Hyun what they were, which I would concede would be binding upon David Hyun in this hearing, but by being told by different people there that attended the meet-[fol. 210] ings there and "told me what was carried on at the meetings." He doesn't say who they were, how he knows they were members of the Communist Party or what they told him. In any event it is completely totally hearsay testimony, a conclusion of the witness, it doesn't lay any foundation whatsoever, nor has any been laid, to show that this witness knows from his own personal knowledge or from the lips of David Hyun what the purpose of these meetings were or what they concerned. For those reasons, I think this Examiner has a perfect right in granting the motions to strike the answers to 252 and 253.

Hearing Officer: Denied.

Counsel: I object to question 254 on the ground that the question is leading and suggestive; on the further ground that it is irrelevant and immaterial.

Hearing Officer: Denied.

Counsel: I object to the question further; I would like to have a ruling on it; the same question, on the ground that the question calls for a conclusion of the witness as to whether or not these people who told him these things were

members of the Communist Party; and no foundation has been laid as to how this witness can answer that question.

Hearing Officer: Overruled.

[211] Counsel: I object to question 255 on the ground that it calls for a conclusion of the witness and no proper foundation has been laid.

Hearing Officer: Overruled.

Counsel: I object to question 256 on the ground that it is leading and suggestive; on the further ground that it calls for a conclusion of the witness; it is irrelevant and immaterial and calls for a speculative answer. Any question which says—

> ". . . does any reason occur to you why David Hyun would not have disclosed his party membership. . . ."

to the witness, is obviously a question calling for a speculative answer and opinion of the witness. It certainly ought not to be allowed in a fair hearing, Mr. Hearing Officer, where we are trying to determine whether or not a man is to remain in this country. This isn't just an ordinary case, where, I agree that sometimes to allow a certain amount of latitude is permitted to secure a conclusion or a certain amount of hearsay. The question in this hearing involves the very life actually of David Hyun, the respondent, whether or not he remains in the United States or whether he is to be deported after 27 years of living here, and I think when we rule on these questions we certainly have to bear that in mind; the issue is a terribly important one and the amount of latitude that can be given to the prosecution in [fol. 212] permitting questions of a hearsay nature requiring speculative and opinion answers, must be a very narrow latitude.

Hearing Officer: Counsel, as far as we have gone in this testimony of Easter Doyle there is nothing in there that shows that he knows that David Hyun was a member of the Communist Party.

Counsel: Yes, I agree with that, but these questions that were asked I say they are ridiculous and a waste of everybody's time and it is impertinent I think to even suggest them that this witness should even bear upon the issues involved.

Hearing Officer: Do you have an objection there?

Counsel: I have a pending objection.

Hearing Officer: It is overruled.

Counsel: I object to question 258 on the ground that no proper foundation has been laid for the question.

Hearing Officer: Overruled.

Counsel: I object to question 259 on the ground that the question already has been answered; on the further ground that it is leading and suggestive; and no proper foundation laid.

Hearing Officer: It's overruled.

Counsel: I object to question 260 again on the ground that it calls for a conclusion of the witness; no proper foundation has been laid; it calls for what only can be a [fol. 213] speculative answer.

Hearing Officer: That question 260 will be disregarded in arriving at a decision in this case.

Counsel: I move to strike that part of the answer to question 262 after the words "Ruth Osaki" on the ground that the balance of that answer is not responsive to the question before the witness and states a conclusion of the witness and hearsay not binding, with no proper foundation having been laid for the latter part of that answer.

Hearing Officer: Denied.

Counsel: I object to question 266—what caused the witness to leave the Communist Party, on the ground that that is irrelevant and immaterial.

Hearing Officer: Overruled.

Counsel: I object to question 268 on the ground that it is irrelevant and immaterial; no proper foundation has been laid for this witness being able to testify as to what the effect of the pamphlet involved written by Ichiro Izuka was upon the membership of his cell; it calls for a conclusion of the witness. There is nothing in the record to show that he asked the other members of his cell what they thought of the pamphlet; there is nothing to show that he was present [fol. 214] when it was discussed; nothing to show anything at all tying up this pamphlet and other members of the cell to which he claims he belonged.

Hearing Officer: Overruled.

Counsel: I object to question 269 in which the questioner asks, or rather I should say in which the questioner states—

> "In other words the party in Hawaii became very security conscious about that time?"

There is a question mark after such statement. I submit that the question is leading and suggestive; it calls for a conclusion of the witness for which no proper foundation has been laid. I object to the question on those grounds.

Hearing Officer: Overruled.

Counsel: I object to question 273 on the ground that it is probably the most leading and suggestive question perhaps in the entire deposition based upon not only nothing in the record so far but based upon what is contrary in the record. The witness has repeatedly stated that David Hyun never did talk to him about the Communist Party and yet this Examining Officer in typical fashion asks:

> "He did talk to you about the Communist Party in Hawaii?"

I object to the question on the ground it is leading and suggestive.

[fol. 215] Hearing Officer: In considering the answer to question 272, the witness states—

> "I had occasion to meet him up there at which time he talked to me about the Communist Party in Hawaii."

I think question 273 is a question. Overruled.

Counsel: Of course when he stated that, the questioner well knew that he was referring back to a time that has already been testified to when the witness had stated that he had not talked to him about the Communist Party in Hawaii. That's of course proven by the next answer, in which the witness:

> "Well not exactly, but he had mentioned the fact that there were discussions up at Dr. Reinecke's home."

I object to question 274 on the ground that is again leading and suggestive. The witness has just stated in case there had been any doubt about it, that Mr. Hyun had not talked

to him about Communist party affairs, and yet the questioner again in question 274 hoping that the witness will take the cue and answer, when he asked—

> "Concerning Communist Party affairs, is that right?"

I object to the question on the ground that it is very leading and suggestive especially in view of the previous testimony.

Hearing Officer: Overruled.

[fol. 216] Counsel: I object to question 275. I give this Examining Officer credit for being persistent, but for more than that I can give him no credit at all; in fact I criticize him very severely. Now here this Examining Officer after being told I don't know how many times that David Hyun never asked him to become a member of the Communist Party and never discussed the Communist Party with him, still the questioner goes ahead and asks this question:

> "But subsequently, as you review this particular conversation you had with David Hyun, does it occur to you that he was talking about the Communist Party at that time?"

I object to the question on the obvious ground that it is leading and suggestive; that it calls for a conclusion; that it is speculative and contrary to the evidence which the witness has previously given.

Hearing Officer: Overruled.

Counsel: I object to question 280 on the ground that it is leading and suggestive.

I withdraw that objection to 280. First I want to object to question 278 on the ground that that question has already been asked and answered; the same question to which I just objected to, and also on the ground the question is therefore leading and suggestive.

[fol. 217] Hearing Officer: Overruled.

Counsel: I now object to question 280 on the ground that it is leading and suggestive.

Hearing Officer: Overruled.

Counsel: I have no further objections or motions in connection with these depositions.

Hearing Officer: The depositions which have been offered

as a part of the record and which were marked Exhibit 5 for identification purposes, are now made a part of this record and will be considered in arriving at a decision in this case.

You may proceed Mr. Tyre.

Counsel: I have nothing further at this time in respect to the depositions. Do I understand the government has no further evidence to present?

Hearing Officer: I don't know.

Counsel: I don't know either.

Examining Officer to Counsel: Do I understand you are waiving cross interrogatories?

Counsel: I am not waiving anything, but I will state that it is impossible, absolutely impossible in any fair hearing within the understanding of due process as it has usually [fol. 218] been construed by our courts to put cross interrogatories to these witnesses 2500 miles away; it is just impossible to do.

Hearing Officer to Examining Officer: You may proceed.

Examining Officer: Well do I understand that counsel is not going to submit cross interrogatories?

Hearing Officer: I don't know whether he is or not. You may proceed with whatever other evidence the government has or counsel may be given his opportunity.

Examining Officer: There has just been admitted into evidence testimony of government witnesses. It seems to me that the next statement in regard to those depositions, insofar as cross interrogatories are concerned, should come from counsel before the government determines its next step.

Counsel: Well I don't want to mislead counsel, Mr. Hearing Officer. I think I have stated my position that it is impossible to present cross interrogatories and because of that I have no intention of presenting cross interrogatories of these witnesses. I take it you mean cross interrigatories in writing.

Examining Officer: Yes.

I move for a continuance of three days in order to ascertain whether another witness is available in Honolulu. I [fol. 219] might state that the determination of this is being

actively considered now and I am awaiting word, I expect word momentarily in that respect.

Hearing Officer: Motion is denied.

Examining Officer: I have nothing further for today.

Hearing Officer: We will take a 10-minute recess. (11:30 a.m.)

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Hearing Officer: Hearing Resumed (11:50). Have you anything further Mr. Broffman?

Examining Officer: Yes I would like to call David Hyun, the respondent, as a witness.

Hearing Officer to Respondent:

Q. Mr. Hyun please stand up and raise your right hand. Do you solemnly swear that your testimony in this proceeding shall be the truth, the whole truth and nothing but the truth, So Help You God?

A. I do.

To Examining Officer: You may proceed Mr. Broffman.

Examining Officer to Respondent:

Q. What is your full true name?

Counsel: I will object to any questions of this witness at this time on the ground that Mr. Hyun has previously been called to testify by the prosecution on at least I think two occasions and there was nothing stated at the time that his [fol. 220] testimony was concluded by the prosecution or that it was intended to bring him back to the stand again. He testified fully and completely to the questions which have been asked in the manner in which the witness saw fit to answer. I don't think it's fair or proper or constitutes a fair hearing to permit the prosecution to put the respondent on the stand and off the stand and on the stand and off the stand at his discretion and his own wishes. Having once excused him from the stand I think the witness is no longer required to resume the stand.

Examining Officer: I would like to point out that the respondent refused to answer any questions whatsoever at the beginning of this hearing. One of the grounds stated was that he had not yet had an opportunity to consult with

counsel, and I take issue with counsel's statement that he has already answered questions fully and completely. He hasn't answered anything at all.

Hearing Officer: Objection is overruled.

Hearing Officer to Respondent: Mr. Hyun you may consult with your counsel as to what your answer will be.

Respondent: I am ready to proceed.

Hearing Officer to Respondent: The question was what is your full, true and correct name?

[fol. 221] A. My legal name to the best of my knowledge is David Hyun.

Examining Officer to Respondent:

Q. Have you ever used any other name or names?

A. We went through that one. I can't answer it in just any fashion because it is difficult to say whether I used the name or not.

Examining Officer to Respondent: Q. Will you give the answer to your best ability and any explanation you may care to offer?

A. Well one of the names that I think have been used in my youth is a literal Korean translation of the name David, called Dawid, supposed to sound like David in Korean. I believe my father probably used a Korean genealogical name, based on some genealogical system the Koreans used. I don't know what the name is; and I think I previously testified that at one time I went to the Honolulu Police Department for personal identification and one of the police clerks insisted that I have a middle initial.

Hearing Officer to Respondent: Just a moment Mr. Hyun, you must be talking about some other hearing or something that has no connection with this present hearing.

A. Possibly I refer to a hearing under another hearing officer; it was subsequent to my first arrest in August of 1949, I believe.

[fol. 222] Q. This hearing is under the warrant of arrest issued on October 31, 1950, and you are apparently talking about testimony given before that time which is not incorporated in any testimony here.

A. In that case the reference I make to previous hearings is incorrect.

Q. Will you state what other names you have been known by, including your Korean name, if you know it?

A. As I was saying previously I went to the Honolulu Police Department for personal identification papers at which place the police clerk insisted that I have a middle initial. He explained that because of the frequency of Oriental names like Wongs and Lees and so on, that it was desirable to have a middle initial. I told him I didn't care for one, but I believe that I agreed to his desire that I have a middle initial; I don't know what the middle initial is; I never used it myself.

Examining Officer to Respondent: Q. Where were you born?

A. I believe I was born in Seoul, Korea.

Q. When were you born?

A. I believe I was born on January 3, 1917.

Q. What is your father's name?

A. My father's name is Soon Hyun.

Q. Where was he born?

[fol. 223] Counsel: I object to that; it calls for a conclusion of the witness.

Hearing Officer: Overruled.

Hearing Officer to Respondent:

Q. Where was your father born, if you know?

A. I don't know myself personally, as a matter of fact, it is my understanding that he was born in Korea.

Examining Officer to Respondent:

Q. Of what country is your father a citizen or subject, if you know?

Counsel: I will object to that question on the ground that it calls for a conclusion of the witness and I now instruct this witness not to answer any further questions on the ground that he does not care to testify in this hearing as a witness called by the prosecution. If the prosecution wishes to establish these facts it will have to establish them by persons other than the respondent.

Hearing Officer: Overruled.

To Respondent: You may either answer or accept the advice of your counsel.

Respondent: I desire to accept the advice of counsel.

Hearing Officer: Do you decline to answer the questions?

[fol. 224] Respondent: On advice of counsel I decline to answer the question.

Hearing Officer: Proceed Mr. Broffman.

Examining Officer: I want to point out that counsel has not registered any grounds whatsoever for his advice.

Counsel: The grounds being that I do not believe the prosecution has the right in a hearing of this sort to call the respondent himself as a witness to establish the facts. If it wants to or desires to or has to establish them against the witness in order to deport him, the witness is not going to be a witness against himself for the purpose of getting himself deported. On that ground he will not answer any questions. He may have other and further grounds for refusing to answer some of the questions; he is refusing to answer all of the questions on that ground.

Examining Officer to Respondent: I believe the question before the witness is of what country is your father a citizen or subect, if you know?

Hearing Officer: The witness has declined to answer that question on advice of counsel. Proceed Mr. Broffman.

Examining Officer to Respondent: Q. Is your father living at the present time?

A. I decline to answer the question on the previous basis.

[fol. 225] Q. What is your mother's name?

A. I wish to repeat my previous answer.

Hearing Officer to Respondent: You claim the privilege after every question if you wish to claim the privilege.

Respondent: I decline to answer that question on the previous grounds as indicated by my lawyer.

Hearing Officer: State your grounds, on advice of counsel or not.

Respondent: On advice of counsel.

Hearing Officer: At this time we will recess for lunch. 12 o'clock noon.

* * * * * * *

Hearing Officer:

Hearing resumed at 1:15 p.m.

You may proceed Mr. Broffman.

Examining Officer to Respondent:

Q. Where was your mother born?

A. My understanding is that she was born in Korea.

Q. What is your mother's name?

A. My mother's name is Maria Hyun.

Q. Of what country is your mother a citizen or subject, if you know?

A. I have no definite knowledge of her citizenship. The only knowledge I have would probably be a surmise, hearsay.

[fol. 226] Q. Of what country is your father a citizen or subject, if you know?

A. I think my knowledge of my father's citizenship is of a similar nature and it's rather a difficult question for me to answer because of the peculiar background surrounding my father's departure from Korea.

Q. Were either of your parents ever citizens of the United States, to your knowledge?

A. To my knowledge I do not know that they are citizens of this country.

Q. Are either of your parents living?

A. Yes.

Q. Which ones are living?

A. My father and my mother.

Examining Officer to Respondent:

Q. Where are they living now?

A. They live in Los Angeles.

Q. Of what country are you a citizen or subject?

A. Well that's also a difficult question for me to answer because of the status, because of the circumstances under which I left Korea and my departure from China. I am under the impression that I am a citizen of China. I have a Chinese passport which indicates that. As to the definiteness of such citizenship it is strictly limited.

Q. I show you a passport identified in this record as Exhibit 2 and ask you whether this is the passport to which you refer.

A. It is.

[fol. 227] Q. This passport shows that it was issued in Honolulu. For what purpose did you obtain this passport?

A. That's also difficult to answer. I might make an explanation if you desire; it is rather involved.

Q. Go ahead.

A. My father thought it would be desirable to have a passport I imagine because of his experience in traveling. Inasmuch as I was an alien without any passport he thought it might be a desirability to have such a passport and I believe that I agreed with him, even though such passport was not necessary to enter the mainland of the United States. As to what later use I might put the passport to I did not know at that time. I do not know at this time.

Q. Did you obtain the passport in connection with your contemplated departure from Honolulu to the mainland?

A. I guess in a sense I might say that.

Q. When did you arrive at the mainland?

A. I believe it was in the very early part of December 1947.

Q. Where did you arrive?

A. At the Los Angeles airport somewheres near Inglewood.

Q. I show you a record of the arrival of one David Hyun on September 1, 1947, issued at the port of Los Angeles, identified in this record as Exhibit 3, I ask you to examine Exhibit 3 and state whether or not that record relates to you.

[fol. 228] A. I believe that the record refers to me.

Q. Since your arrival in Continental United States have you been absent from the United States?

A. No.

Q. When did you take up residence in Honolulu, Territory of Hawaii?

A. I first took residence in the City of Honolulu in the year 1924, I believe around the month of May.

Examining Officer to Respondent:

Q. What was the place of your departure when you left for Honolulu in 1924?

A. My understanding is that I left Shanghai, China.

Q. Had you been a resident of Shanghai prior to that time?

A. To the best of my knowledge, yes.

Q. I show you a certificate of admission in the name of David Hyun showing arrival at Honolulu May 24, 1924, issued at the port of Honolulu, Territory of Hawaii, identified in this record as Exhibit 4. I ask you to examine Exhibit 4 and state whether or not in your opinion that record relates to you.

A. I believe that the document refers to me.

Q. Did you reside continuously in the Territory of Hawaii from the date of your arrival as shown on this Exhibit 4, that is, May 24, 1924, until your arrival on the mainland as shown in Exhibit 3, that is September 1, 1947?

[fol. 229] A. To the best of my knowledge, yes.

Q. I call your attention to the fact that Exhibit 3, Exhibit 4 and Exhibit 2—the latter exhibit being your passport, all show that you are a citizen of China. To the best of your knowledge and belief is that correct?

Counsel: I object to that. The evidence speaks for itself. You are asking for a conclusion of the witness on a matter of law.

Examining Officer: I am asking for his belief in the matter.

Counsel: His belief is still a question of law as to whether or not he is a citizen of any particular country. The record that you have speaks for itself much louder than he can speak.

Hearing Officer: I think the respondent has already stated that he believes himself to be a citizen of China. Am I correct on that Mr. Tyre?

Counsel: I don't know if he has so stated; I don't recall it.

Hearing Officer: Objection sustained.

Examining Officer to Respondent:

Q. Can you explain, Mr. Hyun, how you became a citizen of China, in view of the fact that you stated you were born in Korea?

Counsel: I object to that as argumentative; it calls for [fol. 230] a conclusion; assuming facts not in evidence.

Hearing Officer: Objection sustained.

Examining Officer to Respondent:

Q. During the period of time you resided in the Territory of Hawaii, were you a member of the Communist Party of the United States?

A. I refuse to answer that question on the ground that it might tend to incriminate me and also on the further ground that it violates my rights under the first amendment to the Constitution of the United States.

Q. If you were a member of the Communist Party of the United States during the period of time you resided in the Territory of Hawaii, where did you join such an organization?

A. I refuse to answer the question on the ground that it may tend to incriminate me and also on the further ground that it violates my rights under the first amendment to the Constitution.

Q. If you were a member of that organization in the Territory of Hawaii for how long were you a member?

A. I refuse to answer that question on the ground that it may tend to incriminate me and also on the further ground that it violates my rights under the first amendment to the Constitution.

Q. If you were a member of the Communist Party of the United States during your residence in the Territory of Hawaii, did you hold any offices in that organization?

[fol. 231] A. I refuse to answer the question on the ground that it may tend to incriminate me and also on the further ground that it violates my rights under the first amendment to the Constitution.

Hearing Officer to Respondent:

Q. Mr. Hyun do you mean the Constitution of the United States of America?

A. Yes.

Hearing Officer: Proceed Mr. Broffman.

Examining Officer to Respondent:

Q. If you did hold any office in the Communist Party of the United States during your residence in the Territory of Hawaii, what offices were they?

A. I refuse to answer the question on the ground that

it may tend to incriminate me and also on the further ground that it violates my right under the first amendment to the Constitution.

Q. If you did hold any offices in the Communist Party of the United States during your residence in the Territory of Hawaii what were the duties of each office?

A. I refuse to answer that question on the ground that it may tend to incriminate me and also on the further ground that it violates my right under the first amendment to the Constitution.

Examining Officer to Respondent:

[fol. 232] Q. Since your arrival in the mainland on September 1, 1947, have you ever been a member of the Communist Party of the United States?

A. I refuse to answer that question on the ground that it tends to incriminate me and also on the further ground that it violates my right under the first amendment to the Constitution.

Q. If you were a member of the Communist Party of the United States since your arrival on the mainland where did you join such organization on the mainland?

A. I refuse to answer that question on the ground that it tends to incriminate me and also on the further ground that it violates my right guaranteed by the first amendment to the Constitution.

Q. If you were a member of the Communist Party of the United States since your arrival on the mainland on September 1, 1947, did you hold any offices in that organization since that time?

A. I refuse to answer that question on the ground that it may tend to incriminate me and also on the further ground that it violates my right under the first amendment to the Constitution.

Q. If you did hold any offices since you have been on the mainland what were the duties of each office?

A. I refuse to answer that question on the ground that it may tend to incriminate me and also on the further [fol. 233] ground that it violates my right under the first amendment to the Constitution.

Q. Are you now a member of the Communist Party of the United States?

A. I refuse to answer the question on the ground that it may tend to incriminate me and also on the further ground that it violates my right under the first amendment to the Constitution.

Q. I call your attention to deposition identified here as Exhibit 5, from Richard M. Kageyama, and ask you whether you know Richard M. Kageyama.

A. I refuse to answer that question on the ground that it may tend to incriminate me and also on the further ground that it violates my right under the first amendment to the Constitution.

Hearing Officer to Respondent: Just one moment. You are talking about your rights under the first amendment to the Constitution of the United States. Which particular right? There are several rights specified there.

A. I claim all the rights under the first amendment.

Hearing Officer: That's all I want to know. Proceed Mr. Broffman.

Examining Officer to Respondent:

Q. I show you the deposition identified as Exhibit 5, of [fol. 234] Donald T. Uesugi, and ask you whether you know Donald T. Uesugi?

A. I refuse to answer that question on the ground that it may tend to incriminate me and also on the further ground that it violates my right under the first amendment to the Constitution.

Q. I show you the deposition identified in this record as Exhibit 5, of Ichiro Izuka, and ask you whether you know Ichiro Izuka.

A. I refuse to answer that question on the ground that it may tend to incriminate me and also on the further ground that it violates my right under the first amendment to the Constitution.

Q. I show you the deposition of Easter J. Doyle, identified in this record as Exhibit 5, and ask you whether you know Easter J. Doyle.

A. I refuse to answer that question on the ground that it may tend to incriminate me and also on the further ground that it violates my rights under the first amendment to the Constitution.

Examining Officer: I have nothing further.

Hearing Officer: You may proceed Mr. Tyre.

Counsel: Is it my understanding Mr. Hearing Officer that the government rests?

Examining Officer: Yes.

Hearing Officer: The Examining Officer is not speaking [fol. 235] for the Hearing Officer.

Counsel: I asked the question through the Hearing Officer.

Examining Officer: Yes, in view of the denial of the motion for a continuance until we can ascertain whether another witness is available, the government can not offer anything further at this time.

Counsel: At this time, Mr. Hearing Officer I move for a continuance for a reasonable period to be determined by the Hearing Officer, for the purpose of preparing a defense for the government's case.

Hearing Officer: Just what did you have in mind Mr. Tyre? You were given 10 days to prepare cross interrogatories to the depositions, on March 13, 1951, and I believe those depositions or a copy of them have been in your possession since some time in January 1951.

Counsel: That is correct. I have spent many many hours both with Mr. Hyun and alone poring over those depositions and I think the record in the last two days will be some evidence of that. I of course had no way of anticipating what rulings would be made on objections and motions. Had the rulings been otherwise I think perhaps I would have been in a different position right now. The rulings having been what they are and every single question and answer now being in the record [fol. 236] except possibly one question and answer which will be disregarded, places me in a position which it now seems to me at this time incumbent to put some evidence in the record. Had some of my motions and objections been granted I think that would have been unnecessary.

Of course I had no way of knowing what the rulings would be until I had made my motions and objections.

Hearing Officer: Well I will have to have some information or you will have to make a reasonable showing as to why a continuance should be granted, Mr. Tyre.

Counsel: For the purpose of producing evidence to contradict, explain or qualify the evidence that has heretofore been introduced by the government, particularly the evidence put in by the depositions in the last two days over objections.

Hearing Officer: Have you any statement as to what you intend to introduce? I don't mean you have to name your witnesses or disclose what evidence but I would like to have some idea as to your intentions.

Counsel: I intend to correspond with Honolulu in the first place for the purpose of ascertaining what evidence is available if any for the purpose of putting on the defense [fol. 237] and this will take some time obviously since it all has to be done by correspondence, and I am also contemplating putting on some local evidence to controvert the import, if not some of the specific statements made by the witnesses in depositions introduced as Exhibit 5.

Hearing Officer: Do you contemplate having witnesses appear in Honolulu as well as on the mainland?

Counsel: That I cannot tell until I communicate with Honolulu; I don't know; I have never been there and heretofore I haven't been in correspondence with them concerning evidence.

Hearing Officer to Respondent: Mr. Hyun do you believe there are people in Honolulu who are willing and able to testify in your behalf?

Counsel: I am going to instruct Mr. Hyun not to answer that, because it isn't a proper question for him to determine and it is a matter of law for me to determine how to proceed in this case.

Hearing Officer: It's a matter for me to decide whether or not you are going to get the continuance Mr. Tyre.

Counsel: It is discretionary with you, I admit, but as far as I am concerned I am handling Mr. Hyun's case and I [fol. 238] am the one that is asking for the continuance and I am making representations as his counsel and I

would prefer that he not discuss the question of procedure himself on this record.

Hearing Officer: Well he would be the one that would know whether there were witnesses there.

Counsel: I have consulted with Mr. Hyun and I have an obligation with my client to talk with him before I make my decision.

Hearing Officer: Then you believe that there are witnesses there Mr. Tyre?

Counsel: I have stated that I have to communicate with Honolulu for the purpose of determining whether this evidence will be available as I have already stated on the record.

Hearing Officer: Then if the evidence is available in Honolulu do you contemplate that the evidence will be given in Honolulu? That is one thing I am *trying determine.*

Counsel: I would presume so. It is a little hypothetical at this time.

Hearing Officer: After off-the-record consultation this hearing is *Continued* until 10 A. M. *April 19, 1951,* at counsel's request, in order to allow him to ascertain and state [fol. 239] what evidence he wishes to present in this case. All persons are notified to be present at that date and hour without further notice. The hearing is continued.

Counsel: Mr. Bartos, I want to note on the record that yesterday when Mr. Hyun was taken down to Terminal Island the conditions under which he was transported were just, from what I have been told, abominable. There was a car, a patrol car I guess they are called, with some 15 or 16 persons; it was jam-packed and there were people ill in it, with no ventilation; they were jam-packed in there for an hour and a half getting down there. I know this service prides itself upon conveniences and treatment which it affords persons in its custody. I don't think this is very representative of such pride. I want to call this to the attention of Mr. Bartos and Mr. Broffman so that they may take it up with Mr. Landon or the proper authorities. Mr. Hyun was darn near completely sick in his stomach from the trip that he had to take yesterday after he left here, so I hope very sincerely that you gentlemen will at least see to it that that doesn't happen again today.

Hearing Officer: Well Mr. Tyre, neither myself nor Mr. Broffman has any control over the transportation matters.

Counsel: I am aware of that. I am saying that I hope you will convey this to those who have control over [fol. 240] transportation facilities.

Hearing Officer: I would like counsel to do that if he wishes it done and trust that he will then take it up with the District Director.

Counsel: I so intend.

Hearing Officer: Very well, we will leave that matter up to counsel because neither the Examining Officer nor myself have anything to do with the transportation.

If there is nothing further the hearing is continued as I have stated, until *10 A. M. April 19, 1951* and all persons are notified to be present at that time without further notice.

Hearing is continued (2:15 P. M.)

I certify that to the best of my ability the foregoing is a true and correct transcript of my shorthand notes (book 02003) and the recording made of the testimony taken in this case.

(S.) Norma Williams, Stenographer.

I certify that to the best of my knowledge and belief, the foregoing record is a true report of everything that was stated during the course of the hearing, including oaths administered, the warnings given to the alien and the witnesses, and the rulings on objections, except statements made off the record.

(S.) John B. Bartos, Hearing Officer.

[fol. 241] Immigration and Naturalization Service

TRANSCRIPT OF HEARING—April 19, 1951

By Hearing Officer: Resumed Hearing. In Deportation Proceedings. In the Case of David Hyun.

A 3 611 569
Place of Hearing: Los Angeles, California.
Date of Hearing:
Present:
John B. Bartos, Hearing Officer
Sidney Broffman, Examining Officer
Norma Williams, Stenographer
Milton S. Tyre, Counsel of Record
David Hyun, Respondent

Record by Stenographer and Dictaphone

Hearing Officer to Examining Officer:

Q. Are you ready to proceed Mr. Broffman?
A. Yes, I am.

To Counsel:

Q. Are you ready to proceed Mr. Tyre?
Counsel: I am.

Hearing Officer: This hearing was continued on March 29, 1951, on motion of counsel in order to allow him to ascertain and state what evidence he wishes to present in this case. You may proceed Mr. Tyre.

Counsel: Mr. Hearing Officer, at the last hearing I [fol. 242] believe I advised the Hearing Officer that I would be in contact with Honolulu for the possibility of perhaps presenting some defense in connection with the depositions which have previously been offered and I believe accepted now over objections.

The correspondence which I have had with Honolulu indicates that unless Mr. Hyun can be present there or unless the witnesses can be brought here or that Mr. Hyun is present wherever the cross examination takes place, it is impossible for us to properly conduct any cross examination of these witnesses whose depositions have been taken.

However, there is further evidence which I wish to present aside from the cross examination of the witnesses in Honolulu. Before I do that I would again like to renew my motion previously made I believe on several occasions in this hearing, to have the three witnesses whose depositions have been accepted in this case brought to Los Angeles for the purpose of cross examination, or that David Hyun be provided with the facilities to be taken to Honolulu so that he may be present when the witnesses are cross examined there.

Hearing Officer: Motion is denied counsel.

Counsel: Mr. Bartos, since our last hearing I have inquired concerning this whole proposition of witnesses' depositions being taken from afar and witnesses being brought to the place of the hearing. I have been advised that this has taken place on a number of occasions within [fol. 243] the last year, to say nothing of a long time before that, that witnesses have been brought to the place of hearing by the government, and I understand that in one case, in Seattle I believe it was, the witnesses were brought from the east coast and in San Francisco in another case the witnesses were brought from the east coast and as a matter of fact I am told in one or two local cases right here before Mr. Bartos and I understand Mr. Broffman, the Examining Officer, a witness has been brought, I think it was Mr. and Mrs. Crouch were brought here from I think it was Florida, for the purpose of testifying against a respondent in a deportation hearing right in Los Angeles and this was very recently.

Now it just seems to me that if the Department does have a practice at least from time to time of bringing witnesses several thousand miles in order to appear at the place of hearing that it is not amiss for this Hearing Officer to order such witnesses to be brought here as a condition precedent to their depositions being allowed in evidence; and I want to make this statement, which unless I am told otherwise I assume is correct, as a basis for further renewing my motion that these witnesses be brought so that we may cross examine them or that David Hyun be allowed to go to Honolulu at government expense to be present at the cross examination, or in lieu of that motion being granted I then move that the depositions be stricken from the evidence and

the testimony of the witnesses contained in those depositions be stricken.

[fol. 244] Examining Officer: The government does not feel under any obligation to transport witnesses at great expense over thousands of miles. The taking of depositions is a recognized and accepted and acknowledged form of taking testimony under such conditions.

At the time the depositions were taken in Honolulu counsel and respondent were notified as to the date the depositions would be taken. They could have been present if they so desired, and even though Mr. Hyun is in custody if he had indicated a willingness to be present arrangements would have been made to have him go to Honolulu under proper escort. However, that would have had to be under his own expense if he wanted to be present. That was up to him and that was up to counsel. They did not see fit to avail themselves of that and counsel in the alternative was given an opportunity to prepare cross interrogatories. He too declined to do this. Insofar as Mr. and Mrs. Crouch are concerned, at the time they were called as witnesses in another case they were on the west coast on other matters and since they were on the west coast here their services were utilized in the cases that counsel has referred to.

Counsel: They were here on other deportation matters, isn't that correct Mr. Broffman?

Examining Officer: I don't know. I had nothing to do with their being on the west coast. I don't know for what [fol. 245] specific purpose they were here.

Counsel: I think they so testified in their hearings that they were here on other deportation matters. The records will show they testified I think in one or two or three other cases.

Examining Officer: Well I don't know and I don't see any point in getting into an argument as to why Mr. and Mrs. Crouch were here. We are just concerned with this particular respondent at this time and the facts relating to the taking of the depositions in Honolulu were as I have just outlined.

Counsel: Mr. Broffman you are really avoiding the issue. As a matter of fact, I address this through the Hearing Officer of course, I understand and I would like to have Mr. Broffman advise me to the contrary if it is not true,

that this Department has from time to time in certain cases brought witnesses anywhere from five hundred to a thousand and two or three or four thousand miles in order to have them present at the regular place of the hearing where the deportation matter was in process. It is correct, is it not, hasn't that occurred from time to time during the course of deportation matters pending before the Department of Justice?

Examining Officer: Is that a question to me?

Counsel: I am addressing it through the Hearing Officer, if the Hearing Officer wishes to permit you to answer. [fol. 246] Hearing Officer: I will answer it Mr. Broffman. I will state for the record that witnesses have been brought from various places to testify in deportation hearings. However, the motion was made that depositions be taken in this case in Honolulu. That motion was granted. Counsel was notified of the date, place and time that they were to be taken and notified that the respondent could be represented by counsel at that time. He was not represented.

After those depositions were brought here the hearing was convened on March 13, and for the reason that the respondent had not seen them the hearing was continued until March 28, 1951, in order that he might see them. On March 29, 1951, counsel was given an extension, or a continuance, until this date, to state what evidence or manner of evidence he wished to have presented in the case.

No cross interrogatories have been filed. He was given 10 days to file them. I have considered both of counsel's motions.

Counsel: Before you rule Mr. Bartos, I would like to make one other argument if I may.

Hearing Officer: Proceed.

Counsel: In answer to the statement Mr. Broffman has made, namely that the government didn't see fit to go to the expense of bringing these witnesses here, the three of them, [fol. 247] from Honolulu, or to transport Mr. Hyun to Honolulu.

I want to point out to the Hearing Officer that this is not a question of one party suing another party for some money or a judgment or for damages; it isn't just an ordinary criminal action where a man might be penalized by some

monetary sum or even by jail for six months or a year. This is a deportation matter and Mr. Justice Douglas has pointed out in a very recent case, as well as in the Bridges versus Wixon case, that a deportation matter even though it is not technically considered a criminal matter can be far more onerous, and it is in this case, *is* the very facts that he gave as an example in the two cases I refer to, because in this case David Hyun has been living within what is known as the boundaries of the United States since he was 7 years old and he is 34 today—27 years within the United States and is now being asked to be deported by the Immigration and Naturalization Service.

It just seems to me when there is as much at stake as a man being able to remain in the country of his adoption that he has had for over 27 years and to remain with his wife and two children incidentally who will apparently remain here even though he may be deported, and I hope to God he is not. This is an important issue. This is far more important than an ordinary simple criminal matter or the most serious civil matter, and it just seems to me that we don't ask very much of the Department of Justice [fol. 248] to spend a few hundred dollars necessary to transport David Hyun to Honolulu so he can be there while other counsel—I am not asking that they transport me, although I think they should, as a matter of right, and personal desire; but in any event they should transport David Hyun for a matter of a few hundred dollars so that he may be present to cross examine witnesses. I have said it before and I want to repeat it again, Mr. Hearing Officer, that it is the right of a witness to confront, the right of a defendant rather, to confront the witnesses against him.

It has been classically and is now considered as one of the fundamental necessities to a fair hearing in the term of what we call due process. Here are three witnesses testifying against David Hyun to matters which if they were believed and if they are properly in evidence and so on, could deport this man from his own home after 27 years, and they are not required to look at David Hyun, to watch him, to have to face him, while they make these alleged statements. Number one and number two—David Hyun is not given a realistic opportunity because the government doesn't want

to spend a few hundred dollars, to be able to cross examine these witnesses.

I state- it before and I state it again that cross interrogatories, written questions, when we don't know what the answers to those written cross interrogatories are going to be, are useless. It's really a farce in a case such as this. I concede that it's done in simple civil cases; once in a blue [fol. 249] moon it's done in a criminal case when the defendant agrees to it, but in this case it is absolutely impossible to write cross interrogatories and expect properly to cross examine these witnesses. I think the depositions themselves show, Mr. Bartos, that cross interrogatories of these witnesses would have been an almost useless gesture.

I want to repeat that we simply are not being accorded what is common, ordinary and expected in my opinion, in what is known as a fair hearing in which the defendant is granted due process, his right to appear in court to cross examine witnesses against him and to have them confront him as they testify against him.

I really want to urge this sincerely upon you, Mr. Bartos, that if necessary recess be called that this matter may be considered. The motion which is now before you is the motion I made before, namely to have Mr. Hyun transported to Honolulu that he may be present at the cross examination of these three witnesses, or in lieu of that, that they be brought here so that we may cross examine them in Los Angeles with Mr. Hyun present or in lieu of that that the depositions be stricken and all the testimony of these witnesses taken in Honolulu be stricken from the record.

Hearing Officer: The motions of counsel are denied.

Counsel: Mr. Hearing Officer, I have consulted with my client and we desire to present evidence concerning the [fol. 250] character of the Communist Party. The charge in this case against David Hyun is that he has been since his entry into the United States a member of the Communist Party. This charge I understand is made under the McCarran Act. Nevertheless, it is our view that we are privileged to present evidence concerning the character of the Communist Party and I would move for a short con-

tinuance for the purpose of obtaining witnesses to testify concerning that particular subject.

I want to state, as I have stated before this hearing, that I have attempted to locate a witness on the subject, with some difficulty today locally. I have not yet exhausted all the possibilities locally and if necessary I may wish to examine a witness who does not reside within the city. However, it will not be necessary for me to have a long continuance for this; I believe I can ascertain this matter within a very short time; I would say not more than a week, at the most 10 days, for the purpose of obtaining and offering evidence on that subject, that limited subject; I would move a continuance at this time Mr. Hearing Officer at your discretion, that is, whatever time you may think proper; all I would seek is a week or 10 days.

Examining Officer: I would object to a continuance on the ground stated because under the so-called McCarran [fol. 251] Act the aims, purposes and character of the Communist Party is not an issue and would have no relevancy to the charge in the warrant of arrest. The only issue in that charge is whether or not the respondent here was a member of the Communist Party.

Counsel: Well, it is my view, Mr. Hearing Officer, that the question of the aims, purposes, objectives and character of the Communist Party, that being the party with which the respondent is charged with membership, is definitely relevant and material, notwithstanding that the charge does not allege the character of the Communist Party other than to say that the respondent is charged with being a member. I think it is definitely relevant and material to have that evidence if such evidence is available and I understand that it is available; only a question of finding the witness who will testify concerning it and I feel reasonably sure that I can obtain such a witness if granted a short continuance for that purpose.

Hearing Officer: Motion is denied and the objection is sustained.

Counsel: Then I understand now I am not given an opportunity, Mr. Hearing Officer, to gather together the evidence on this limited subject. I am not asking a general continuance for any and all purposes, but for the sole and

exclusive purpose of presenting evidence on this one sub-
[fol. 252] ject, namely the character, objectives, aims and purposes of the organization with which the respondent is charged with membership.

Hearing Officer: Mr. Tyre, apparently you don't even know a witness who will so testify, which is beside the point, because the characterization of the Communist Party is not in issue. The motion for that purpose is denied Mr. Tyre.

Counsel: I want this understood now, I am not saying I don't know anyone who will testify to it; I want a proper witness who is going to be able to be totally qualified to testify concerning the subject about which I have mentioned. There are lots of witnesses I presume available but I want to gather the one or two best witnesses on the subject and in order to do that I would need, as I stated before, a short continuance. I don't want the Hearing Officer to understand that this is going to be looking for a needle in a haystack; it isn't that at all; it is just a question of corralling the proper witnesses for this purpose, and I may get the proper witness right here in Los Angeles but in lieu of that I am sure I will not have to go far. In any event I am not asking for any lengthy stay. This is just to present the defense which I consider relevant and material. A week or 10 days can't possibly prejudice anybody but the respondent who during this wime will continue to remain in custody, and he is willing to have the matter go over.
[fol. 253] That's all we ask.

Hearing Officer: Motion is denied, Mr. Tyre, on that ground.

Counsel: Mr. Hearing Officer I understand that in several other cases, deportation matters within the last six months, there has been testimony subject to cross examination by the government, testimony offered by respondents, which testimony has been cross examined by the government, concerning the subject about which I now seek a continuance for the purpose of presenting testimony.

The Hearing Officer does not wish to grant the continuance in order that I may present the oral testimony before this hearing. I ask whether or not the Hearing Officer would be willing to take judicial notice of the examination of such witnesses in other hearings in the last year before this very same Department on that subject, in which event of

urse I could refer to it in my brief and we would name
tually the particular case or cases which we would incor-
rate by judicial notice.

Examining Officer: I would most strenuously object to
ything of that nature. Certainly testimony of witnesses
not a proper matter of judicial notice.

Counsel: Not the testimony; it is the record I am refer-
ol. 254] ring to Mr. Hearing Officer more than just the
stimony; I am referring to taking judicial notice of the
cord which has been made in other cases before this very
me Department and as a matter of fact on the Pacific
ast within the last year.

Examining Officer: The record consists of nothing more
an testimony and other evidence. I don't think it is a
oper matter of judicial notice; proper to take judicial
tice of a case that was publicly held but not as to the
stimony given in that case.

Counsel: These cases were publicly held; they were open
arings such as the one we are now conducting. The only
fference is that instead of David Hyun as the respondent,
ere are other persons who were named as respondents
d charged with membership in the Communist Party
d witnesses in those cases testified, I presume were quali-
d concerning the Communist Party and they were sub-
ted to, I understand, a thorough cross examination by
e government witnesses. I ask if the continuance is not
anted at least that we be permitted to have this Hearing
ficer take judicial notice of the testimony of those wit-
sses in those cases. I am willing to confine it to one case
that will help the situation any, so that we may at least
ve in this record the testimony about which I desire, with-
ol. 255] out the necessity for the further continuance.

Examining Officer: What I have in mind is this that *is*
obably is a proper subject for judicial notice, that there
s a case "A" versus "B" and a citation on a certain date,
t it is not a proper subject for judicial notice as to the
stimony given in that particular case.

Counsel: Well I am not urging, Mr. Hearing Officer, one
y or the other on that, I am not sure frankly what the
w would be on the question of judicial notice. If I were
rtain that the law required judicial notice to be taken of
I don't think I would be arguing on the matter at this

time. What I am asking is, if Mr. Broffman would be willing to stipulate to such testimony in order to avoid any continuance or in lieu of his stipulation if the Hearing Officer would indicate that he would be willing in lieu of granting my motion to the continuance to take such judicial notice.

Examining Officer: In view of my position that the aims and character of the Communist Party is irrelevant to the issues in this case, I can't stipulate it.

Counsel: I would then ask the Hearing Officer if he would take judicial notice so that we may avoid the necessity of a further continuance. I will of course if you indicate that [fol. 256] you will, indicate the name of the case involved and the witness involved and the number of the case.

Hearing Officer: Mr. Tyre, as the aims and characterization of the Communist Party of the United States is not an issue here I can't take judicial notice of any other case of a civil hearing of this type. Now this case is not going to be decided by me. If you wish to set forth your arguments, citations, and so forth as to the aims and character of the Communist Party, you may do so in a supporting brief for the consideration of the Commissioner and the Attorney General. I have had decisions in cases of this type from the Commissioner stating that where it is not an issue a continuance is not justified. Have you located any witnesses in Honolulu to testify for the respondent, as you expected to?

Counsel: Well, I have previously indicated the results of my inquiry. I wonder if we might just have a moment recess Mr. Bartos. I want to consult with Mr. Broffman.

Hearing Officer: Very well, we will take a 5-minute recess.

• • • • • • •

Hearing Officer: Hearing resumed. You may proceed Mr. Tyre.

Counsel: Mr. Hearing Officer, I just wanted to state further, a very brief argument, that I consider this relevant [fol. 257] and material to the subject which is the question before this Hearing Officer, before this Department, and for this reason, that the charge itself alleges that David Hyun was a member of the Communist Party of the United States.

Nothing further is stated in there as to the character of it. Now we do know that the McCarran Act has set forth certain findings at the outset of the Act, purporting to describe the character of the Communist Party, then ending up with, therefore this being the character of the Communist Party any person, any alien who has been a member of the Party since his entry is subject to deportation. Now as I understand it there is classical and constitutional law; one has always been permitted to introduce evidence to rebut any evidence which may be contained i*m* the Congressional findings concerning the character of the person involved or the organization, membership in which he is charged. Now that is all we are seeking here. All the McCarran Act has done has made certain findings and we wish to present testimony to rebut those findings, at least offer evidence for the consideration of this Department, the Attorney General, that these findings made in the McCarran Act are subject to rebuttal and I don't know how else we can present such evidence unless it is permitted to be done by testimony or by stipulated testimony.

I appreciate the Hearing Officer's offer to do it through a brief. Now if I can have the stipulation of Mr. Broffman [fol. 258] and the Hearing Officer that the statements contained in my brief concerning the character of the Communist Party shall be considered as evidence in this case then I will withdraw my motions for continuance and stipulating the testimony and so on, because all I wish is to present what may be considered by this Department as evidence.

Hearing Officer: Just a moment Mr. Tyre. This Department, as far as the terms of McCarran Act are concerned, is bound by the Congressional findings of fact and it is not for this Department to consider whether those findings of fact are the facts or not. That is a matter for the courts to determine on judicial review. I am not going to grant any continuance for that material to come in and as I have said, the designated Commissioner of the Attorney General will read your brief but he is still bound by the Congressional findings of fact, and that is not an issue in the case.

If counsel wishes to take issue with the Congressional findings of fact, if he gets an adverse decision in this case,

the United States courts are the proper place to contest that matter; not here.

Examining Officer: I want the record to clearly reflect my position in the matter. First I don't think it is a proper subject matter for a brief insofar as this case is [fol. 259] concerned, and secondly, if counsel nevertheless puts in his brief statements regarding the character of the Communist Party I do not in any manner, shape or form, accept, acquiesce or stipulate to any of the statements he makes in such brief.

Hearing Officer: I know, but counsel can put in whatever he wants in a brief. He can do that and they will read it. Proceed Mr. Tyre.

Counsel: In view of the rulings that have been made I have nothing further Mr. Hearing Officer.

Hearing Officer: Have you any questions you wish to ask of the respondent?

Counsel: No further testimony or evidence to offer.

Hearing Officer: Mr. Broffman you may proceed.

Examining Officer: I again move for a continuance in order to take another deposition from a witness in Honolulu.

Hearing Officer: Motion is denied.

Examining Officer: I have nothing further to offer.

Hearing Officer: Do you wish to further ask any questions of the respondent?

Examining Officer: No.

Hearing Officer: No further government evidence or government witnesses?

[fol. 260] Examining Officer: No.

Hearing Officer: The hearing is concluded.

Hearing Officer to Counsel: Mr. Tyre, a recommended decision of the Hearing Officer in this case will be prepared and you will be furnished a signed copy and will be granted five business days within which to submit exceptions if you so desire.

Counsel: What is the procedure Mr. Hearing Officer in the event I require more than five business days to file exceptions?

Hearing Officer: Then apply for an extension of time and show your reasons as to why five days is insufficient.

Counsel: May that be done through you or the local Director or the Commissioner?

Hearing Officer: That must be done by a formal letter request setting up your reasons and it will come to me, but address it to the District Director at Los Angeles, California.

Counsel: May I have some advance notice so that I can gage my time, as to approximately when—I don't want to commit you to a particular day, but if it is at all possible I would appreciate being accommodated to know approx-

[fol. 261] mately when I may expect the decision.

Hearing Officer: You should receive it within 10 days. Is there any further business?

Examining Officer: No. Counsel: No.

Hearing Officer: Hearing is Closed.

I certify that to the best of my ability the foregoing is a true and correct transcript of my shorthand notes (book 02002) and the recording made of the testimony taken in this case.

(S.) Norma Williams, Stenographer.

I certify that to the best of my knowledge and belief, the foregoing record is a true report of everything that was stated during the course of the hearing, including oaths administered, the warnings given to the alien and the witnesses, and the rulings on objections, except statements made off the record.

(S.) John B. Bartos, Hearing Officer.

[fol. 262] EXHIBIT "1"

Warrant
For Arrest of Alien

United States of America
Department of Justice
Los Angeles, Calif.

No. 1600-61258
A-3611569

To District Enforcement Officer, Los Angeles, California
Or to any Immigrant Inspector in the service of the United States.

Whereas, from evidence submitted to me, it appears that the alien David Hyun who entered this country at Honolulu,

T.H. ex SS "President Cleveland" on the 24th day of May, 1924 has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

> The Act of Oct. 16, 1918, as amended, in that he has been, after entry, a member of the following class set forth in Section 1(2)(C) of said Act; An alien who was a member of the Communist Party of the United States.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, [fol. 263] if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1951."

> Pending determination of deportability, the alien named is to be continued in custody. This warrant supersedes that issued on the 7th day of July, 1949.
> For so doing, this shall be your sufficient warrant.
> Witness my hand and seal this 31st day of October, 1950.
>
> (S.) H. R. Landon, District Director. (Seal.)

On Back

Warrant For Arrest of David Hyun Served by me at Los Angeles, Calif. October 31, 1950, at 2:45 P.M.

Alien was then informed as to the cause of arrest, the conditions of release as provided therein, advised as to right to counsel and furnished with a copy of this warrant.

(S.) Thomas J. Volan, Title Investigator.

[fol. 264] Note Re Exhibit "2"

Exhibit "2" is Passport No. 1191550 Issued to David Hyun by the Consulate General of the Republic of China at Honolulu, on August 21, 1947.

(Here follow 2 Photolithographs, side folios 265, 266)

EXHIBIT 3

CERTIFICATE OF ADMISSION OF ALIEN

Form Approved.
Budget Bureau 43-R056-42.

Port of [illegible], Calif.
[illegible]-1456
Date [illegible] 27, 1949

I HEREBY CERTIFY that the following is a correct record and statement of facts relative to the admission to the United States of the alien named below:

(1) Manifest No., ; Class ;

(2) ~~Steamer~~ Plane NC-[illegible] ; Line, [illegible] American Airways, Inc. ;

(3) Port at which admitted, [illegible] Airport, Los Angeles, Calif. ; Date, 9-1-47 ;

(4) Name, David Hwun ; Age, 30 ; Sex, Male ;

(5) Married, ---- ; Occupation, ---- ; Able to read, ---; Write, --- ;

(6) Citizen of, China ; Race, Korea ;

(7) Place of birth, Korea ;

(8) a. Class of immigration visa, --- ; No. — ; Issued at — ; Date, — ;
b. Transit Certificate No. — ; Issued at — ; Date, — ;

(9) Last permanent residence, 1340 Ala Wai, Honolulu, T. H. ;

(10) Name and complete address of nearest relative or friend in country whence alien came. ---- ;

(11) Destination, Los Angeles, Calif; By whom passage paid, --- ; Money brought, --- ;

(12) Whether in U. S. before, --- ; When, ---- ; Where, ---- ;

(13) Whether going to relative or friend, ---- ; Give name and complete address:

(14) Purpose of coming to U. S., --- ; Intended length of stay, ---- ;

(15) Condition of health, ---- ;

(16) Height, 5'4" ; Complexion, --- ; Color of hair, Black ;

(17) Color of eyes, Brown ; Identification marks, ---- ;

(18) Examined by Inspector, Virgil Calkins at Honolulu, T. H. on 11-24-47 ; Head tax paid, ---- ;

(19) Accompanied by Mary Hwun, F, 33; Freeland Hwun, M, 22 Mos; David Hwun, M, 4 ; How admitted, Primary ;

(20) Purpose and period of time for which admitted, Perm. Residence ;

(21) Remarks: AR/3611569; examined at Honolulu, T. H. under 8 CFR 116.9(f) on 11-24-47 and issued Form I-146, Alien Certificate-Insular Territory, #11848 which was surrendered at Honolulu, T. H., 11-30-47 to Inspector Lee.

(Signature) George M. Scallorn (Official title)
George M. Scallorn, Chief, Entry, Departure and exclusion section, Los Angeles, Calif.

Form I-404
U. S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Edition of 12-15-43

THIS FORM IS INSUFFICIENT AS A BASIS FOR A PETITION FOR NATURALIZATION

EXHIBIT "4"

EXHIBIT "4"

EXHIBIT 4

1600-1171

CERTIFICATE OF ADMISSION OF ALIEN

Form Approved, Budget Bureau 48-R018-43.

L. A. 1600-61258
AR-3011509

District Director
Los Angeles, California

Port of Honolulu, T. H.

Date May 20, 1949

I HEREBY CERTIFY that the following is a correct record and statement of facts relative to the admission to the United States of the alien named below:

(1) Manifest No., 153/103/1 ; Class, Third ;

(2) S. S., Pres. Cleveland ; Line, Dollar ;

(3) Port at which admitted, Honolulu, T. H. ; Date, May 24, 1924 ;

(4) Name, DAVID HYUN ; Age, 7 ; Sex, M ;

(5) Married, No ; Occupation, -- ; Able to read, N ; Write, N ;

(6) Citizen of, China ; Race, Korean ;

(7) Place of birth, Seoul, Korea ;

(8) a. Class of immigration visa, -- ; No. -- ; Issued at -- ; Date, -- ;
b. Transit Certificate No. -- ; Issued at -- ; Date, -- ;

(9) Last permanent residence, Shanghai, China ;

(10) Name and complete address of nearest relative or friend in country whence alien came, Mo-Mrs. Soon Hyun
Shanghai, China ;

(11) Destination, Honolulu, T. H. ; By whom passage paid, Korean Methodist Church ; Money brought, -- ;

(12) Whether in U. S. before, No ; When, -- ; Where, -- ;

(13) Whether going to relative or friend, ; Give name and complete address:
Fa-Rev. Soon Hyun
Korean Methodist Church, Honolulu

(14) Purpose of coming to U. S., -- ; Intended length of stay, -- ;

(15) Condition of health, Good ;

(16) Height, 3' 8" ; Complexion, Yel. ; Color of hair, Blk. ;

(17) Color of eyes, Blk. ; Identification marks, third finger left hand off ;

(18) Examined by Inspector, -- ; Head tax paid, Yes ;

(19) Accompanied by Myung Ok Hyun, 4,f ; How admitted, Primary Insp. ;

(20) Purpose and period of time for which admitted, 5/26/24 Perm. ;

(21) Remarks: Ver. for C/A Hon. 27-903, 3/26/41

THIS FORM IS INSUFFICIENT AS A BASIS FOR A PETITION FOR NATURALIZATION

EXHIBIT [illegible]"

(Signature) [illegible] (Official title) Searcher

Form I-404
U. S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Edition of 12-15-48

EXHIBIT 4

POOR COPY

22

[fol. 267] EXHIBIT "5"

Before the
U. S. Department of Justice

Immigration and Naturalization Service

In the Matter of DAVID HYUN

Deportation Proceedings
Honolulu File No. 1700-1171
C.O. No. A-3611569
Los Angeles No. 1600-61258

Immigration and Naturalization Station
Honolulu, T. H.

Monday, December 18, 1950

Met, pursuant to notice, at 9:00 a. m.

Before Milton T. Simmons, Hearing Officer

Appearances:

W. F. Moss, Examining Officer
U. S. Department of Justice
Immigration and Naturalization Service
Honolulu, T. H.

Y. Fukushima, Attorney at Law, on behalf of
Richard M. Kageyama

Reporter: Albert Grain, Official Court Reporter,
U. S. District Court, Honolulu, T. H.

[fol. 268] Depositions of:

Richard M. Kageyama
Donald T. Uesugi
Ichiro Izuka
Easter J. Doyle

Proceedings

By Hearing Officer: This proceeding is for the purpose of taking depositions in the case of David Hyun as ordered

by the Hearing Officer at Los Angeles, California, on November 22, 1950. Has the Examining Officer served notice upon the Respondent and his Counsel regarding these depositions?

By Examining Officer: That is correct. I can offer a notice of appearances, a notice of the date and place specified for the taking of these depositions, dated December 7, 1950, which were sent registered mail to Milton S. Tyre, the attorney for the Respondent, and the Respondent. And further, I have been advised by attorney Symonds of the firm of Bouslog and Symonds that he has been in communication with Mr. Tyre and had originally intended to enter an appearance here. However, I have just been advised by Mr Symonds that he does not desire to enter an appearance, nor does he desire to cross-examine the deponents today. I will offer you copies of the communications addressed to both Tyre and to David Hyun.

By Hearing Officer: The copies of the notice to Milton [fol. 269] Tyre and to David Hyun, dated December 7, 1950, will be placed in the record as Exhibits A and B respectively. Do you have your first witness ready for testimony?

By Examining Officer: The first witness is Richard M. Kageyama.

By Hearing Officer:

1. Q. Will the witness please stand and raise your right hand. (Witness complies) Do you solemnly swear that all the testimony you will give in these proceedings will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

2. Q. You are informed that if you wilfully and knowingly make false statements in these proceedings regarding anything important to the decision in this case you may be prosecuted for perjury, the penalty for which is imprisonment for not more than five years, or a fine of not more than $2,000, or both such fine and imprisonment. Do you understand?

A. I do.

3. Q. Will you please state your name and address for the record?

A. Richard M. Kageyama, 933-A Piikoi St.

By Hearing Officer: May the record reflect that this witness is accompanied by Counsel, Y. Fukushima. And your address ie——

[fol. 270] By Mr. Fukushima: Biship National Bank Building, King and Bishop Streets, Honolulu.

By Hearing Officer: The Examining Officer may proceed.

By Examining Officer:

4. Q. Mr. Kageyama, do you appear here in response to a subpoena served on you on December 8, 1950?

A. Yes, I do.

5. Q. Mr. Kageyama, what is your occupation?

A. That of an insurance salesman.

6. Q. Will you tell us briefly what your occupational background has been?

A. Well, after high school I went to the City of Honolulu from the Island of Hawaii and coming to this island I worked as a painter, house painter, for five years, and during that time I was drafted in the service for five years, and then coming out from the Army worked for the Veterans Administration for less than a year; and then went into the insurance business, and since then have been in the insurance business.

7. Q. Well, when did you enter into the insurance business?

A. Beg pardon?

8. Q. When, in what year did you enter into the insurance business?

A. Oh, I'd say about '46.

[fol. 271] 9. Q. And you are in the insurance business at the present time?

A. Yes.

10. Q. Have you held any governmental positions?

A. Yes, as elected member of the Board of Supervisors, in the City Council.

11. Q. And you are still serving in that capacity?

A. Yes, still a member of the City Board.

12. Q. Will you state briefly your educational background?

A. My education was given in the primary grades on the

Island of Hawaii, and received my high school at Hilo High School. Graduated in '37 or '8 after two years of absence. No further education after that.

13. Q. I refer you now to a passport containing a photograph which has previously been entered into evidence at this proceeding and ask you if you recognize the person whose likeness appears thereon?

Q. What was the question?

14. Q. Do you recognize the person whose likeness appears thereon?

A. Yes.

15. Q. By what name did you know that person?

A. By Hyun.

16. Q. What was that?

A. Hyun.

17. Q. Does he have a first name?

[fol. 272] A. He has, but I don't know whether it is——

18. Q. What was his first name?

A. David Hyun.

19. Q. Mr. Kageyama, are you now or have you ever been a member of the Communist Party of the United States?

A. With advice of Counsel I refuse to testify on the ground that it might tend to incriminate me.

20. Q. Did you know David Hyun to have been a member of the Communist Party?

A. I refuse to testify on the ground, on the advice of Counsel; I refuse to testify on the ground that it might tend to incriminate me.

21. Q. Will you state again, please, your grounds for refusing to testify?

A. On the advice of Counsel I refuse to testify on the ground that it might tend to incriminate me.

By Examining Officer to Hearing Officer: Mr. Hearing Officer, I ask that this witness be excused.

By Hearing Officer to Deponent:

22. Q. Do I understand from your answer to the last questions that you do not intend to testify on any matter relating to the connection of David Hyun with the Communist Party on the same grounds?

A. Yes.

23 Q. The answer is Yes?
A. Yes.

[fol. 273] By Hearing Officer: The witness is excused.

(Witness excused.)

Testimony of Donald T. Uesugi.

By Hearing Officer: Will the witness please stand and raise your right hand. (Witness complies) Do you solemnly swear that all the testimony you will give in these proceedings will be the truth, the whole truth, and nothing but the truth, so help you God?

By Deponent: I do.

By Hearing Officer: You are advised that if you wilfully and knowingly make false statements in these proceedings regarding anything important to the decision in this case you may be prosecuted for perjury, the penalty for which is imprisonment for not more than five years or a fine of not more than two thousand dollars or both such fine and imprisonment. Do you understand?

By Deponent: Yes.

24. By Hearing Officer: What is your name and address?

By Deponent: My name is Donald T. Uesugi, 1630 Makiki Street, Apartment 12.

[fol. 274] Hearing Officer to Examining Officer: The Examining Officer may proceed.

By Examining Officer:

25. Q. Mr. Uesugi, do you appear here in response to a subpoena served on you on December 8, 1950?

A. I do.

26. Q. What is your present occupation?

A. Present occupation is accounting-clerk, Telephone Company.

27. Q. What telephone company have you worked for?

A. I work for Mutual Telephone Company.

28. Q. Will you state briefly your occupational background?

A. Well, my occupational background is more—I started from the bottom in the Telephone Company and worked

my way up, and started from office boy to the job I am working in now.

29. Q. Was the Telephone Company the only organization you ever worked for?

A. Well, I worked part-time in the canneries but my steady job is the Telephone Company.

30. Q. And how long have you worked for Mutual Telephone Company?

A. Going on 17 years.

31. Q. Will you state briefly your educational background?

A. My educational background is, I went to 8th grade; the rest I did at, I studied at home.

32. Q. When and where were you born?

[fol. 275] A. I was born in 1915, November 28, in Hanamalu, Kauai.

33. Q. Have you lived in the Territory of Hawaii all your life?

A. That's right.

34. Q. Mr. Uesugi, I call your attention to Exhibit 2 of the hearing previously adduced in this case, which consists of a Chinese passport, and ask you whether or not you recognize the person whose likeness appears thereon?

A. Yes, I recognize him as David Hyun.

35. Q. Have you previously known David Hyun?

A. Well, previously, well, I recall seeing him in Kauai. I don't know him. Since I met him I told him that, Weren't you in Kauai? And he said, Yes. Actually knowing him, you mean in Honolulu?

36. Q. During what period of years did you know David Hyun in Honolulu?

A. Well, the period between about 1945 to now.

37. Q. In what connection did you know David Hyun?

A. I knew David Hyun as I joined the Communist Party.

38. Q. Was he to your knowledge also a member of the Communist Party?

A. Well, as far as I am concerned I think he is a Communist Party member.

39. Q. What causes you to believe that he is a member of the Communist Party?

A. My belief, is at the meetings I have been I seen him [fol. 276] there, so I presume he is a communist.

40. Q. These meetings were what type of meetings?

A. Well, they were educational meetings, sometimes social.

41. Q. But who sponsored them?

A. Well, at one meeting where I saw him was at Makiki at Charlie Fujimoto's place. He was there.

42. Q. You have previously stated that you were a member of the Communist Party. To what group or cell did you belong?

A. Well, I belonged to the Makiki cell, and then the Punchbowl cell. And there was one in Piikoi Street, or something like that, and at Adele Kensinger's home; then at Ralph Vossbrink's place.

43. Q. These places that you are describing were the scenes of these meetings?

A. Yes, those are the places where they had the meetings.

44. Q. Do I understand you to state that these were Communist Party meetings at these places?

A. That's right.

45. Q. To what group or cell of the Communist Party did you belong?

A. I actually did belong to the Makiki cell.

46. Q. Did you hold any appointive or elected office in that cell?

A. Well, the only thing I did was to collect dues.

47. Q. Well, were you the treasurer of the group?

[fol. 277] A. Well, technically—well, it must be the treasurer or something.

48. Q. Well, were you appointed to this position or elected to this position?

A. I wasn't elected. They just told me that you collect dues, that's all. The meeting was——

49. Q. How did you happen to join the Communist Party?

A. Well, I joined the Communist Party because of my ex-wife.

50. Q. Will you explain that a little more fully, please?

A. Well, one day my wife proposed to me to join the Communist Party. Actually it was all behind Charlie Fujimoto and his wife; she told me that if I don't join the Communist Party I might as well get a divorce. We don't think alike. I didn't join at that time but later on she kept on forcing me. Well, she put the pressure on me so I asked

them if I am going to get into any trouble by joining this thing because I don't know anything about the Communist Party. At that time was the first time I knew the word "communist". So they promised me that there is no trouble at all if you are a citizen. So I joined the Communist Party.

51. Q. Well, when, as closely as you recollect, did you actually become a member of the Communist Party?

A. Between the year 1945 and '46, I think.

52. Q. Can you more closely establish the time you actually became a member of the Communist Party?

[fol. 278] A. Well, I think it was '45 to '46 but I am pretty sure it is closer to the end of 1946 that I actually became a member.

53. Q. When did you start paying dues, about this same time?

A. About this same time.

54. Q. Did you receive a card or a book or something that described you as a member of the Communist Party?

A. I did.

55. Q. And was it at this time that you were appointed to take part in the collection of dues?

A. No, that was done about a year later.

56. Q. After you had received your party card?

A. That's right.

57. Q. Now, in connection with the activities of the Communist Party, do you remember any occasion that you saw David Hyun at party meetings?

A. I do.

58. Q. Will you describe for us that occasion?

A. Well, most of the time I saw him was at Charlie Fujimoto's home in Kaia Street; then about two or three times at Punchbowl Street. And on the meetings, well, I never saw him——

59. Q. All right. Going back to the occasions of the meetings at Charlie Fujimoto's house, will you first tell us who is Charlie Fujimoto?

A. Well, according to myself, Charlie Fujimoto is sup-

[fol. 279] posed to be the chairman because he seemed to be running the meeting.

60. Q. Now, at these meetings at Charlie Fujimoto's house were there other people besides communists at these meetings?

A. Well, there were a lot of people, such as Wilfred Oka and Eileen Fujimoto, Jeanette Nakama, and, well, I saw one time Harry Kuhiro came in there, too.

61. Q. Well, was it your understanding that these meetings which Charlie Fujimoto directed, were these meetings of the Communist Party?

A. They were meetings of the Communist Party.

62. Q. Did David Hyun attend these meetings?

A. Well, he attended some of the meetings there.

63. Q. Do you remember any specific occasion when David Hyun——

A. Don't remember any specific meetings when he was there but I know I saw him there.

64. Q. What was the character of the discussions that took place at these meetings?

A. Well, the discussion was discussing the people—Well, I don't know exactly the title but it is a little book about this size. (indicating) It is a monthly issue, I think. We discussed what is in that book there.

65. Q. You do not recall the title of the book?

A. I don't recall. All I know is it was written by Foster or something.

66. Q. Well, what was the nature of the material in the [fol. 280] book?

A. Well, the material in the book was something like concerning labor movements.

67. Q. You previously mentioned that you had seen David Hyun at meetings on Punchbowl Street?

A. That was after Kaia Street.

68. Q. Now, these meetings on Punchbowl Street, were they Communist Party meetings?

A. Well, they weren't exactly meetings because that is the time they had to move out from Kaia Street because they said something like it is being watched and this and that. So when we moved up to Punchbowl we hardly had any written matter to read—just a general discussion.

69. Q. Who were present at this meeting?

A. Well, there was Eileen Fujimoto, Jeanette, David Hyun and myself. I think once or twice Adele Kensinger was there, too. That's all.

70. Q. Were these meetings to the best of your knowledge and belief concerned with Communist Party business?

A. What was that?

71. Q. Were these meetings to the best of your knowledge and belief concerned with Communist Party business?

A. I do.

72. Q. Was there anyone at these meetings who was known to you as not a member of the Communist Party?

A. Not that I know of.

[fol 281] 73. Q. Can you state definitely that all the persons at this meeting were members of the Communist Party?

A. Well, according to my thinking anybody who is in that certain particular night there that they call meetings, who are there, well, I think they are communists.

74. Q. You know this because of your familiarity with the communist procedures, is that correct?

A. Yes.

75. Q. You have previously testified that you questioned the advisability of joining the Communist Party because you thought you might get into trouble?

A. I did.

76. Q. What caused you to do this?

A. Because in the first place, well, they were holding meetings, well, in closed doors, and I got suspicious and I didn't like it. I felt if it is something that is legal, why close the door and pull down the shades and all that? And when I finally got into the Communist Party I found out all these things were supposed to be known only to us. In other words, the members of the cell.

77. Q. Did David Hyun attend meetings where matters like you have just described and discussed, that is, those matters which were supposed to be known only to members of the Communist Party?

A. Yes, he did.

[fol. 282] 78. Q. Could you state definitely that the meetings that David Hyun attended were closed meetings of the Communist Party?

A. Yes, they were definitely communist meetings; they closed the doors.

79. Q. Do you know to which group or cell David Hyun may have belonged?

A. Well, the only cell that, cells that I know he belonged to would be Punchbowl and Kaia Street, Makiki cell.

80. Q. Do you know definitely that he belonged to either or both of these cells?

A. Well, from my own opinion I think he is a communist. Otherwise I have never seen his card but by seeing him at the meetings.

81. Q. Did you have any reason for believing that he was not a communist?

A. I have no reason to believe that he is not a communist. He must be one because of being at the meetings.

82. Q. Because he attended closed meetings of the Communist Party which you knew was not open to anyone else but Communist Party members, is that correct?

A. That's correct, because I know it is a meeting and nobody else would be in it.

83. Q. As I recall your previous statements, you yourself were not very much interested in the communist movement, is that correct?

[fol. 283] A. That's correct; never did like it anyway from the start, but I was forced into it.

84. Q. And for that reason you didn't take a great deal of interest in who the members were or to which cell or group they belonged, is that right?

A. That's right, except only with persons that I attended. That's all.

85. Q. Was there any other occasion that you can recall that David Hyun attended at any closed meeting of the Communist Party?

A. No, I can't recall any more besides that Punchbowl and Makiki cells.

86 Q. How many meetings of the Makiki cell did you observe David Hyun attending?

A. About two or three meetings.

87 Q. And this was as closely as you can place the time, when?

A. Well, that should be between the year, of the latter part of '47 and early part of '48.

88. Q. Now, with regard to the meetings at the Punchbowl

cell, can you establish the approximate date that these meetings took place?

A. I can't tell you exactly the date but it should be in '48 because that's the time—that was the last, the last place I went to, and I handed in my resignation to Charlie Fujimoto.

[fol. 284] 89 Q. Now, how many of these closed party meetings of the Punchbowl cell did you observe David Hyun attending?

A. Well, I think it should be about two or three, because I didn't stay there long.

90 Q. You just stated that you resigned from the Communist Party?

A. Yes.

91 Q. Did you submit a formal letter of resignation?

A. I did not. I just gave my card back and I told them from today on I don't want no part of it. That's all.

92 Q. To whom did you return the card?

A. I gave my card to Charlie Fujimoto.

93 Q. Did the party attempt to get in touch with you following your giving back the card to Charlie Fujimoto?

A. Never did after that.

94 Q. Has anyone approached you from the Communist Party since that time?

A. Well, the only time somebody tried to approach me was the time when I got my first subpoena to go to the Capitol Building to be on the stand, and that was Charlie Fujimoto. He came over to my place about twice looking for me, which I wasn't home. And the reason, well, I don't know. He didn't want to leave his name but my aunt asked him to leave his name so he finally did, and when she told me Charlie Fujimoto, well, I could guess what he came for. That's the only approach I had from anybody from the Communist Party.

[fol. 285] 95 Q. Will you state again when you first actually joined the Communist Party?

A. Well, I actually joined the Communist Party either the latter part of '45 to between 1946. I think it is closer to 1946.

96 Q. You mean either in the latter part of 1945 or the early part of 1946, is that correct?

A. That's right.

97 Q. And what was the approximate date of your statement to Charlie Fujimoto that you no longer desired to be a member?

A. That was in the latter part of 1948.

98 Q. During this period that you were a member of the party, did you pay dues?

A. I did.

99 Q. To whom did you pay these dues?

A. Well, I used to give my dues to Eileen Fujimoto.

100 Q. You mean the wife of Charlie Fujimoto?

A. That's right.

101 Q. Do you know what Charlie Fujimoto's office is in the Communist Party?

A. Well, at the time, just by hearing, he was supposed to be the chairman of our Makiki cell.

102 Q. Did he hold any other position in the Communist Party?

A. That I wouldn't know.

[fol. 286] 103 Q. Have you any idea that he may have held such a position?

A. Well, I don't know. By guessing, he should, because he does all the talking.

104 Q. Is there anything further that you would like to say at this time?

A. Well, I guess that's about all I know.

Examining Officer to Hearing Officer:

105 Q. Mr. Hearing Officer, may this witness be excused?

A. The witness may be excused.

(Witness excused.)

Testimony of Ichiro Izuka.

Hearing Officer to Deponent:

106 Q. Will the witness please stand and raise your right hand. (Complies) Do you solemnly swear that all the testimony you will give in these proceedings will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

107 Q. You are advised that if you wilfully and knowingly make false statements in these proceedings regarding anything important to the decision in this case you may be prosecuted for perjury, the penalty for which is imprisonment for not more than five years or a fine of not more than two thousand dollars or both such fine and imprisonment. Do you understand?

A. Yes.

108 Q. What is your name and address?

[fol. 287] A. My name is Ichiro Izuka. I live in Hanapepe, Kauai. My box number is 27.

Hearing Officer to Examining Officer: The Examining Officer may proceed.

By Examining Officer:

109 Q. Mr. Izuka, when and where were you born?

A. I was born in Hanapepe, Kauai, June 5, 1911.

110 Q. Will you state briefly your educational background?

A. I went to school at Eleele, Kauai, and finished my elementary grades, and after that for quite a while I worked as a longshoreman, and in 1938 I got further education after joining the Communist Party.

111 Q. Will you state briefly your occupational background?

A. In 1927 I worked as a longshoreman in Kauai Terminals, Limited. The company was engaged in loading and discharging of cargoes from ships.

112 Q. As I understand you, you were a stevedore, is that correct?

A. Yes, stevedore.

113 Q. And have you done any work prior to the time you becamse a stevedore?

A. Prior to the time I graduated in 1927 I didn't have any permanent occupation but part time canefield work, plantation work.

114 Q. Then your first steady employment was as a stevedore in Kauai, is that correct?

[fol. 288] A. That's right.

115 Q. How long did you continue in that occupation?

A. I worked as a longshoreman up to 1941.

116 Q. And following that, what did you do?

A. After that, after I was released from Army detention I was transfered to Honolulu to work on a defense job for the U. S. Engineers, and I worked at this defense job up to 1946.

117 Q. You stated that you were detained by the Army, is that correct?

A. Yes.

118 Q. For what reason were you detained by the Army?

A. As soon as Japan attacked Pearl Harbor for three or four months I still continued my employment on the waterfront, and on April 11, 1941, at one o'clock in the morning a policeman came to my house and said that the Sheriff wants to see me at 12 o'clock that day. So when I went to the Sheriff's office they took me to the Territorial Circuit Court Building and without hearing I was detained for a week. And after a week I had my first hearing and I didn't know what the charges were. And after questioning me for about three hours I was sent back to the camp again. Then about a month later I had my second hearing, and they went over the same proceedings of hearing and they sent me back again in the camp. Then on August 8 a provost marshal came to my place and said that if you sign a [fol. 289] certain copy that I am free. That was August 8. Then for two months I didn't get a job. I applied for my reinstatement in my former job but the company did not give me the same job back. So for the two months I weaved Lauhala purses, pocketbooks, because I learned the trade in the camp. And during that time lots of Army officers and soldiers in Kauai, and I made pretty good business in Lauhala weaving. So for two months I did that job. In the meantime I had contact with Honolulu unions and I was advised by Jack Hall by correspondence to see Major Selby, to contact Major Selby to make arrangements for me to leave Kauai and to find some other work in Honolulu because at the present time I couldn't get a job on the Island of Kauai because of plantation's opposition to me.

119 Q. Their opposition was based primarily on what?

A. Opposition was based because of my militancy in union activities.

120 Q. And you lived in Honolulu then from 1942 until when?

A. From—until 1946.

121 Q. And in 1946 where did you move to?

A. In 1946 or early in 1947—I'm sorry—I moved to Kauai in 1947.

122 Q. And you have been living on Kauai ever since then, is that correct?

A. That's correct.

[fol. 290] 123. Q. Since you have been back on Kauai, since 1947, what has been your occupation?

A. Since then I was doing my own business, raising poultry, chickens.

124. Q. And you are presently engaged in that business, is that correct?

A. Yes.

125. Q. You previously stated that you had been a member of the Communist Party. When did you first join the Communist Party?

A. I joined the Communist Party in 1938.

126. Q. Who recruited you into the party at that time?

A. Denichi Kimoto.

127. Q. Does Denichi Kimoto have an English name?

A. Yes, he is known by Jack Kimoto.

128. Q. Following joining the Communist Party in 1938 how long did you remain a member?

A. I joined in 1938 and resigned from the party in 1946, October.

129. Q. Were you continually a member of the Communist Party from 1938 until 1946?

A. I was a party member from 1938 to 1946 but during that period after Pearl Harbor was attacked the Communist Party was dissolved for the time being and we reactivated in 1945.

130. Q. Then, as I understand you, the Communist Party [fols. 291-292] was dissolved in the Territory of Hawaii from 1941 until 1945, is that correct?

A. Yes.

131 Q. I show you Exhibit No. 2 of the hearing previously adduced, which is a Chinese passport bearing a photograph. Will you state whether or not you recognize the individual whose likeness is thereon?

A. Yes, this is David Hyun.

132. Q. Will you state your previous acquaintance with David Hyun?

A. When we reactivated in 1945——

133 Q. Reactivated what?

A. The Communist Party, in 1945, we were separated in various groups. At that time we had three groups. One group was called the I.L.W.U. Waterfront Group Branch of the Communist Party; and the other group was called the Waikiki Branch, which involves all non-I.L.W.U. groups; and another one was known as the Kaimuki Branch, which includes office workers, white collars, housewives, and this sort of people. And during that time I definitely knew that David Hyun belonged to the Kaimuki Branch. During my membership from 1945 to the time I resigned I was invited to attend an executive board meeting of the Communist Party in the Territory of Hawaii three times, and during the meeting of the executive board I met David Hyun at that meeting representing the Punchbowl group. I mention Punchbowl because later on the three groups were dissolved because the membership grew [fol. 293] and they reorganized to some other various branch concerning the districts. In other words, all members who live in Punchbowl should attend the Punchbowl branch, and all members who live in Kaimuki should attend the Kaimuki branch, and all members working in the waterfront should either attend I.L.W.U. branch or the McCabe branch, McCabe, Hamilton and Renny branch. So this is the reason why I say, why I saw David Hyun representing the Punchbowl group, representing the Punchbowl group in Dr. Reinecke's home.

134 Q. Now, these groups or branches that you referred to, they are groups or branches of what?

A. Branches of the Communist Party of Hawaii.

135 Q. What was the occasion that you were invited to attend the executive committee sessions of the Communist Party?

A. The first meeting I was invited to attend the meeting because in 1946 the I.L.W.U. waterfront, the union members were kind of demoralized. The company was taking advantage of the contract they signed. And the

membership were very weak. And Kawano wrote to the headquarters in San Francisco that Bridges should send some high officers to build the morale up on the Honolulu waterfront. And Kawano told me that Henry Schmidt is coming over for that purpose and I should attend that executive board meeting of the Communist Party which was held in Reinecke's home, to hear firsthand information on the methods Henry Schmidt is going to apply to build the [fol. 294] morale of the I.L.W.U. members. At that meeting, in which I saw Henry Schmidt present, he outlined the procedures which the union should take. And a couple of weeks afterwards all the small, petty beefs started on the waterfront of sling loads and things of that sort. And I think they had stoppage of work for about two or three days on the Lureline.

136 Q. You have used a term: I.L.W.U. What do those initials mean?

A. That signifies the International Longshoremen's and Warehousemen's Union.

137 Q. Why should the activities and policies and strategies of the International Longshoremen's and Warehousemen's Union be discussed at a Communist Party executive meeting?

A. Well, at that time I am sure that the policies and programs of the I.L.W.U. was first discussed in Communist Party meetings before even the executive board of the I. L. W. U. met or even before the general membership met. Everything was discussed in the Communist Party branch meetings.

138 Q. Now, at this meeting which you have described the purpose of, was David Hyun present?

A. Yes, David Hyun was present at that meeting.

139 Q. And his purpose in being there was what?

A. He was a representative of the Punchbowl branch.

140 Q. Of what?

A. Of the Communist Party.

[fol. 295] 141 Q. What was the make-up of the executive committee of the Communist Party of the Territory? Who attended it?

A. At that time I attended the executive board meeting; each branch had their representative in this executive

board meeting. David Hyun represented the Punchbowl branch. Ralph Vossbrink represented the Puunui branch to which I belonged. Jack Kawano represented the McCabe, Hamilton and Renny Stevedoring branch. Eileen Fujimoto represented the Castle and Cooke branch. John Reinecke represented the Kaimuki branch. And besides that we had officers like Jack Denichi Kimoto, James Freeman, and at this particular meeting Hall and McElrath were also represented.

142 Q. Can you identify Hall and McElrath further than you have?

A. Yes. Jack Hall and McElrath were union officers of the I.L.W.U., and when we reactivated in 1945 for the first I believe, two months Jack Hall was elected chairman of all of the branches in Waikiki. At the same time he was a member to the executive board representing the Territorial set-up of the Communist Party. Bob McElrath didn't hold a position as a branch representative but he was handling the educational program of the I.L.W.U. besides being a member of the Communist Party.

142 Q. How were the branch representatives of the various groups that attended the executive committee, how were they selected? Were they elected or appointed?

[fol. 296] A. Well, they were elected by the branch members. For instance, I can give you an example. In our branch at Puunui when members of that particular branch hold elections, we agreed and voted that Ralph Vossbrink should be our representative to the executive board of the Communist Party of Hawaii.

144 Q. Now, during this meeting which you attended at which time was discussed the need of raising the morale of the waterfront workers, did David Hyun take part in the discussion or vote on any issues or participate in the activities of the meeting to your observation?

A. At that meeting David Hyun did not voice any opinion but we all listened to the recommendation which Henry Schmidt presented. But after that I attended another meeting in John Reinecke's home of the executive board of the Communist Party and at that meeting we had discussions of the sugar strike in 1946. And at that meeting the executive board members went on record that

each branch should select some members who go over to various plantations to build the morale of the strikers. And we were instructed that we should participate in that morale-building program. And at that time I heard David Hyun participate in the discussions voicing his opinion that we should not take part in the plantation strike morale-building, and he asked all kinds of answers to that effect. But the majority went on record that we should go to the plantations and help to build the morale. After that I think we made one or two trips to the plantations to do [fol. 297] some entertainment before the striking people in the plantations.

145 Q. Did you attend any other executive board meeting of the Communist Party in the Territory of Hawaii in which David Hyun was present?

A. Yes, I attended another meeting which I knew definitely was some time in 1946 in October. That was right after the primary election. We were told that James Freeman was sent over to Hawaii from California to be a paid functionary of the Communist Party, and I should attend the meeting because James Freeman would bring the report from California. At that meeting David Hyun was present and discussions took place on not only James Freeman's program but also at that time discussion took place on the endorsement of Territorial candidates.

146 Q. You mean candidates for public office?

A. Public office, especially through the endorsement, endorsement concerning delegate to Congress.

147 Q. And David Hyun participated in these discussions?

A. Yes, David Hyun was very anxious to hear what I've got to say about the endorsement of the Republican delegate, because at that time I was a strong supporter of the Democratic candidate. And David Hyun asked me questions, you know, about why I wanted to support a Democratic candidate when the party went on record in supporting Farrington.

148 Q. Farrington was which candidate?

A. Delegate to Congress of the Republican Party.

[fol. 298] 149 Q. Which party?

A. Republican Party.

150 Q. And David Hyun was also interested——

A. David Hyun was also interested in the activities of myself with Mr. Berman as to our support of the Democratic candidate. And after that meeting, during the meeting, after the discussion of the Democratic candidate, we took up the matter of paying James Freeman's salary. And James Freeman reported that half of his salary should come from the State of California and half from the Territorial Communist Party. And his salary should not exceed more than two hundred dollars. In other words, we pay a hundred dollars, the Territorial party pays a hundred dollars, and the California pay a hundred dollars. And during the discussion Jack Kimoto brought up the subject that he said that the last time he had discussions with Richard Gladstein, Richard Gladstein promised him that Gladstein's law firm will donate one thousand dollars to the Territorial Communist Party in the event the Communist Party came out open in the Territory. So this question was asked of James Freeman, if the party couldn't get hold of this one thousand dollars from the law firm of Gladstein. In that reply James Freeman said that Gladstein's firm were shrewd operators and if they were going to give the Territorial Communist Party one thousand dollars they will not donate any money to the California Communist Party because they wouldn't duplicate their financial con-[fol. 299] tribution. So his recommendation was to just forget about the thousand dollars because he's rather see the State of California get the benefit of the donation.

151 Q. And, as I understand it, David Hyun was present at this executive board meeting and took part in these discussions, is that correct?

A. Yes, that's correct.

152 Q. On any occasion that you can remember, was anyone other than a Communist Party member present at these executive board meetings of the Communist Party?

A. You mean any member?

153 Q. Any person who was not a member of the Communist Party.

A. Well, I am sure that all of them were active members in the Communist Party.

154 Q. And you knew, as a matter of fact, that David

Hyun represented the Punchbowl group of the Communist Party at this executive board meeting, is that correct?

A. Yes, that is correct.

155 Q. Did you on any other occasion have or transact any Communist Party business with David Hyun?

A. Well, I met David Hyun many times personally but not in actual transaction of the Communist Party program.

156 Q. Did he ever make any statement to you concerning his party membership at other than these executive board meetings which you have described?

[fol. 300] A. Well, I didn't have enough—I didn't spend enough time with David Hyun because after reactivation I had very few occasions to meet him.

157 Q. You say "reactivation." You mean reactivation of what?

A. Communist Party in 1945. See, we reactivated in 1945 and I resigned in October 1946. So it is only about a year that I was active in the Communist Party. And during that period, of course I knew David Hyun; I met him in the union office; I talked to him. But as far as transaction of the Communist Party program in my personal contact, I didn't have any.

158 Q. Would there be any reason why on the occasions that you would meet Hyun socially that he would not discuss party business with you?

A. Well, I think that it was known to Communist Party members that we shouldn't discuss party matters in such social gatherings.

159 Q. In other words, the party discipline provided that outside of the party meetings you would not recognize one another as a party member, is that correct?

A. Yes.

160 Q. That was part of your training and indoctrination that you received, is that correct?

A. Yes. But it doesn't mean that we can't talk to each other as non-communists.

[fol. 301] 161 Q. Did you on any occasion talk with him as one communist to another?

A. Oh, yes, I have on many times, I talked to David Hyun; specially I talked to him during the dispute they had about these office workers in pier 11 office. That inci-

dent, this incident happened when Jack Hall and Dave Thompson discharged an office clerk, the name of Carol Abe. And she was in the office workers union, and David Hyun was, I believe, in official capacity representing the office workers union. And he took the matter up with Jack Hall, and Jack Hall and Dave Thompson discharged Carol Abe as office clerk. And I also participated in that dispute and talked to Jack Hall about it.

162 Q. This was, as you describe it, a dispute within the Communist Party, is that right?

A. Well, within the Communist Party of discharging another party member from an office job.

163 Q. In other words, the discussion that you had with Hyun and these other people that you have mentioned was a discussion within the Communist Party as to the advisability of discharging another party member?

A. Yes.

164 Q. Is that correct?

A. That was understood clearly that it was a discussion among the party members because there were no outside members involved in it. And David Hyun was representing [fol. 302] the union for reinstatement. And I also helped the union, the office workers union, to reinstate Carol Abe and I talked to Jack Hall for about an hour and one-half on that matter.

165 Q. But the motivation behind this was the fact that Abe, Carol Abe, was a member of the Communist Party as well as yourself and Hyun and Hall and the other people who took part in this discussion, is that correct?

A. That is correct.

166 Q. I would like to go back to 1938, Mr. Izuka, when you first joined the Communist Party. From whom did you receive instructions regarding party aims and policies?

A. I received instructions from Jack Kimoto and Jack Hall.

167 Q. Did you on any occasion attend a school where your communist background could be broadened?

A. Yes, in 1939 I was approached by Mr. Kimoto that I was to attend a state training school of Communist Party members in California. He said that I have the militancy and the intelligence and it would be worthwhile for me to attend the school.

168 Q. What was the name and location of the school?

A. The school was called the State Training School of Communist Party Members. Address is 121 Haight Street.

169 Q. In what city?

A. San Francisco.

[fol. 303] 170 Q. Did you at this school receive instruction in the basic organization of the Communist Party?

A. At that school we were taught mainly upon the theoretical background to arm ourselves with Marxism and Leninism in the approach of Capitalist society. As far as the foundation of the Communist Party, I got that prior to going to this Communist Party school.

171 Q. You did, then, before going to the Communist Party school receive instruction in the organization of the Communist Party, is that correct?

A. Yes, that is correct.

172 Q. From whom did you receive this instruction?

A. Kimoto made, gave us the instructions of organization of the Communist Party.

173 Q. Now, from this instruction and from what other knowledge you may have, the Communist Party in the Territory of Hawaii was a part of what next higher body?

A. Kimoto told us that our local branch is affiliated to the Territorial central committee, and the Territorial central committee in turn is directly under the California state committee. And beyond that their affiliation goes to the New York central committee.

174 Q. And the general name of this communist party in the United States was what? What was the name of the entire party?

[fol. 304] A. The Communist—you mean in the entire United States?

175 Q. Entire United States.

A. It was known as the Communist Party of the United States of America, C.P.U.S.A., I believe. Those were our initials. C.P.U.S.A.

176 Q. To your knowledge did correspondence or other communication come from the California executive committee or go back from Hawaii to the California Executive Committee?

A. Well, we were told that our instructions usually come

from San Francisco and we should deal with the San Francisco headquarters. I mean California.

177 Q. That was the proper chain of command, then? It was from the Territory to California to the national party in New York, is that correct?

A. Yes, that is correct.

178 Q. How was communication carried on between the California party and the Hawaii party?

A. Our members understood that important matters, important matters should not go by mail but should be carried through by couriers working on the ships. And that's how the Communist Party of Hawaii and the party in California had correspondence.

179 Q. Do you know of your own knowledge what distribution was made of the funds paid in dues by the members in the Territory of Hawaii?

[fol. 305] A. Yes, when we reactivated, when the Communist Party reactivated in 1945, I was a member to the Waikiki branch of the Communist Party, and at the first meeting when Jack Hall was elected chairman of the Waikiki branch I was elected as secretary-treasurer. Ralph Vossbrink was elected as literature committee and Bob McElrath was elected as educational director. And since I was the treasurer I collected all the dues from the members of my branch in Waikiki, which I have a card quoting all the names and numbers. And I was further told that the Waikiki branch should retain 20 percent of the dues and 80 percent should be sent to the Territorial treasurer of the Communist Party. And I usually gave the money to Dr. John Reinecke who was at that time the Territorial treasurer of the Communist Party, the 80 percent of the dues. And Dr. Reinecke retained his share of percentage of the dues. I don't know exactly how much dues the Territorial central committee retained from the 80 percent, but it was understood that the next amount of money was sent to California. And then California retained their share of the percentage of the dues and the balance goes to the national executive board of the Communist Party in New York.

180. Q. Who told you these things?

A. Well, the report was made in the branch committee

by Jack Hall and I listened to Kimoto on the allotment of the dues, how the dues should be divided among all the nation's branches.

[fol. 306] 181. Q. Well, this was part of the basic instruction you received as the cell treasurer of the Waikiki cell?

A. Yes, I was told that I should retain 20 percent and I—because when our Waikiki branch was dissolved, broken up into various district branches, we had 20 percent left in our treasury, and before we dissolved we came to the conclusion, that the majority said that the 20 percent left in our Waikiki branch should be transfered over to the Territorial committee, executive committee of the Communist Party. So one day I saw Dr. Reinecke at the pier 11 headquarters and I said that I was instructed by our members that 20 percent should be turned over to the Territorial treasurer of the Communist Party. And I asked John Reinecke whether he wants the money in cash or in check. He said, well, if possible you can pay me in check because I didn't have cash at that time. So I had my pocket checkbook and borrowed his pen and I wrote a check, the balance of the check under the name of John Reinecke, surrendering 20 percent total funds to him at that time.

182. Q. This distribution of dues which you have mentioned had been taught you in your early indoctrination while you were treasurer of the Waikiki branch, is that correct?

A. Yes.

183. Q. Can you state definitely from your own knowledge that the local branch gave a certain portion of its dues to the state branches which in turn transmitted a [fol. 307] portion of those funds to the national branch?

A. Yes.

184. Q. That was common knowledge to all members of the Communist party, is that correct?

A. Yes, that is correct.

185. Q. Did you on any occasion observe the couriers that you have described as the means of communication between the Hawaii branch and the California branch making their report?

A. Yes. I think I remember twice when the couriers came. When Earl Browder was kicked out from the Com-

munist Party for his revisionist ideas, California sent two representatives who attended the California convention of the Communist Party in connection with ousting of Earl Browder. And the convention report was in turn made at John Reinecke's home in one of the executive board meetings we held at that time. And Ralph Vossbrink and another delegate who I can't recollect the name gave a general report of what took place at the state, California state communist convention.

186. Q. You have previously identified Jack Denichi Kimoto as a member of the Communist Party. Can you state the purpose for which he came to the Territory of Hawaii?

A. Yes, Denichi Kimoto left the Islands some time in the 1930's, in the '30's and in 1938, in 1937, when we organized our unions we didn't have intelligent leadership. And the Communist Party members in the Territory asked the California state committee of the Communist Party to send [fol. 308] a representative to help the unions to organize. And since Denichi Kimoto was originally from Hawaii and could speak the Japanese language fluently and very intelligently in the line of communist indoctrination, he was contacted by Bill Schneiderman. Schneiderman was the general secretary of the Communist Party for the State of California. And he told Kimoto that he should go back to Hawaii and start making his contacts and build a communist branch in the Territory. So when Kimoto approached me and later on when I got acquainted with him, he told me of his activities why he came to Honolulu, to start the ball rolling in building the Communist Party.

187. Q. During the period of your membership did you have a party card or dues book?

A. Yes, when I joined the Communist Party in 1938 I had a book. And for the dues you pay you have stamps which signify that you paid the dues.

188. Q. Do you have a communist party book or card—did you have a communist party book or card from 1946 until the time of your resignation?

A. Yes, I had one in 1945, not a book but a card.

189. Q. And this card described you as a member of what organization?

A. As Communist Party of Hawaii.

190. Q. Of Hawaii?

A. Yes. Well, Hawaii. But at the same time it says of the entire United States, Communist Party. That card [fol. 309] doesn't signify particularly Hawaii. It says, the card says, membership of the Communist Party of the United States of America. But we are known to be from Hawaii.

191. Q. But the card had printed on it what phrase?

A. Communist Party of the United States of America.

192. Q. Did all the other members in the Territory, to the best of your knowledge, have like or similar cards?

A. Oh, they all had the same cards.

Examining Officer to Hearing Officer: Mr. Hearing Officer, I move for a recess until 1:30 this afternoon.

Hearing Officer: So ordered.

(The hearing recessed at 11:00 A.M.)

After Recess

(The hearing resumed at 1:30 p.m.)

Testimony of Ichiro Izuka (Continued).

By Hearing Officer:

193. Q. You are reminded that you are still under oath to tell the truth. Do you understand?

A. Yes.

Hearing Officer to Examining Officer: The Examining Officer may proceed.

By Examining Officer:

194. Q. Mr. Izuka, will you state again the members of the executive board of the Communist Party of Hawaii, as you remember them?

[fol. 310] A. Jack Denichi Kimoto, Dr. John Reinecke, Jack Kawano, Eileen Fujimoto, Ralph Vossbrink, David Hyun, Mrs. McElrath, James Freeman. That's all.

195. Q. Was Charlie Fujimoto a member of the executive board?

A. Yes, Charles Fujimoto.

196. Q. Was Jack Hall a member of the executive board?

A. At the begining Jack Hall was a member but later on he was replaced by Ralph Vossbrink doing the membership of the Waikiki branch.

197. Q. Will you further identify Jack Denichi Kimoto?

A. Jack Kimoto was sent to Hawaii in 1938 when the Communist Party requested a leader to develop party members in Hawaii. He was the man in 1938 in charge of all the organizational activity in the Territory of Hawaii. That means including Kauai, Oahu, Maui and Hawaii.

198. Q. Who is Dr. John Reinecke?

A. Dr. John Reinecke at the time when I was treasurer of the Waikiki branch he was the treasurer of the Territorial Communist Party. At the same time he represented the executive board from the Kaimuki branch.

199. Q. Who is James Freeman?

A. James Freeman was sent to Hawaii in 1946, October, to be a paid Communist Party functionary to do Communist Party activities in the Territory.

200. Q. Who is Ralph Vossbrink?

[fol. 311] A. Ralph Vossbrink was assistant to Rudolph Eskovitz, business agent for the Marine Cooks and Stewards Union. He was the chairman of the Waikiki branch through the executive board of the Communist Party and later on he represented the Puunui branch of the Communist Party as chairman to the executive board of the Communist Party of the Territory of Hawaii.

201. Q. Who is Jack Hall?

A. At the time of reactivation of the Communist Party in 1945 Jack Hall was chairman of our branch for a short period of time. Later on he was replaced by Ralph Vossbrink. He is also the regional director of the I.L.W.U. in the Territory.

202. Q. Who is Charles Fujimoto?

A. Charles Fujimoto represented the Kaimuki branch of the Communist Party to the executive board of the Territorial Communist Party, and later on he became known as executive secretary of the Communist Party, of the Territory.

203. Q. Who is Eileen Fujimoto?

A. Eileen Fujimoto is the wife of Charles Fujimoto and she was the chairman of the Castle and Cooke Branch of the Communist Party and a representative to the Territorial executive board of the party.

204. Q. Who was Jack Kawano?

A. Jack Kawano at the time I knew him, he was the president of I.L.W.U. Local 137, and at the same time he repre-[fol. 312] sented the McCabe, Hamilton and Renny branch of the Communist Party; also an executive board member of the Territorial Communist Party.

205. Q. Who is Robert McElrath?

A. Robert McElrath at the time when I was treasurer of the Kaimuki branch—beg your pardon—Waikiki branch —he was a member of that branch and at the same time he was information director of the I.L.W.U.

206. Q. Do you know a man named Easter J. Doyle?

A. Yes.

207. Q. Was Easter J. Doyle to your knowledge ever a member of the Communist Party?

A. I remember he attended meetings at my place in Puunui.

208. Q. Did he belong to the same cell that you belonged to?

A. Yes. We were told that Easter Doyle, since he had lived in the section of Liliha, belongs to the Puunui branch of the Communist Party.

209. Q. You were treasurer of this particular branch, were you not?

A. No, I wasn't a treasurer. The treasurer was Willis Wong.

210. Q. Did you ever have occasion to collect dues or issue party cards to Easter Doyle?

A. No, I did not.

211. Q. Did he attend meetings of the cell in which you belonged?

[fol. 313] A. Yes.

212 Q. And you knew him as a member of the Puunui cell of the Communist Party, is that correct?

A. Yes.

213 Q. That's all I have.

A. Another point, I think. I'd like to make a correction,

that I meant at the time when I was detained was on April 11, 1942, instead of 1941.

214 Q. You mean in regard to the time when you were detained by the military authorities on the Island of Kauai, is that correct?

A. Yes.

215 Q. Are there any other corrections or additions that you would care to make to your testimony?

A. Well, that same date applies to the time when I was released on August 8, 1942.

216 Q. August 8, 1942, is the correct date?

A. Yes.

Hearing Officer: The witness is excused.

By Examining Officer:

217 Q. Mr. Izuka, your appearance here today was pursuant to a subpoena served upon you, is that correct?

A. Yes, it is correct.

(Witness excused.)

[fol. 314] Testimony of EASTER J. DOYLE.

By Hearing Officer: (To Deponent)

218 Q. Will the witness please stand and raise your right hand. (Complies) Do you solemnly swear that all the testimony you will give in these proceedings will be the truth, the whole truth, and nothing but the truth, so help you God?

A. I do.

219 Q. You are advised that if you wilfully and knowingly make false statements in these proceedings regarding anything important to the decision in this case you may be prosecuted for perjury, the penalty for which is imprisonment for not more than five years or a fine of not more than two thousand dollars or both such fine and imprisonment. Do you understand?

A. I do.

220 Q. Will you please state your name and address?

A. My name is Easter J. Doyle, living at 1727 Kahanu Street,

Hearing Officer to Examining Officer: The Examining Officer may proceed.

By Examining Officer:

221 Q. Mr. Doyle, when were you born?

A. I was born on the Island of Hawaii in the District of Hoopuloa on April 3, 1921.

222 Q. Mr. Doyle, you appear here today as a result of a subpoena served on you on December 8, 1950, do you not? [fol. 315] A. I do.

223 Q. Will you give us a brief statement concerning your educational background?

A. I attended the Kam schools from the 9th grade until my senior year, including my senior year.

224 Q. And when did you graduate?

A. In the year 1940.

225 Q. And that is from high school, is that right?

A. That's right.

226 Q. Did you have any further educational, further education after you left high school?

A. None whatsoever.

227 Q. Will you state briefly what your occupation history has been?

A. Since graduating from high school I was employed by the Hawaiian Gas Products as Machinist; since 1949, September of 1949, until the present time I am being employed by the Queens Hospital as a maintenance machinist.

228 Q. During the period of your employment as a machinist, did you or did you not belong to a labor organization?

A. I did belong to the I.L.W.U. Local 150.

229 Q. Did you hold any elective or appointive union office?

A. I did. I was union steward down at the Hawaiian Gas Products during the year 1946 to, including the year 1947.

230 Q. Did you hold any other offices in the union?

A. Yes, I was executive secretary of the C.I.O. Council for a period of six months.

[fol. 316] 231 Q. And this was during what year?

A. In the year 1947.

232 Q. I show you a photograph contained in a Chinese passport previously presented in evidence in the present hearing and designated as Exhibit 2. Will you look at this photograph and tell me whether or not you recognize the person?

A. I do.

233 Q. Who is that person?

A. David Hyun.

234 Q. Mr. Doyle, have you ever been a member of the Communist Party?

A. Yes, I was a member from about the middle of 1946 until about 1948, about the middle of 1948.

235 Q. To what cell or group did you belong?

A. I was a member, when I first joined as I was a member of the Puunui cell; then after a reorganization program they set up labor group cells. At that time I was a member of the Local 150 cell.

236 Q. You mean subsequent to your membership in the Puunui cell you became a member of the Local 150 cell, is that correct?

A. That's right.

237 Q. Do you know a man named Ichiro Izuka?

A. I do.

238 Q. Do you know whether or not Ichiro Izuka has ever been a communist?

[fol. 317] A. Yes, he was one.

239 Q. To what cell or group did he belong?

A. At the time that I knew him he was a member of the Puunui cell.

240 Q. Did David Hyun ever talk to you about communism?

A. Not directly. He had told me to attend a meeting which was a discussion meeting up at Dr. Reinecke's home.

241 Q. What was the purpose of this meeting and discussion?

A. Well, to my understanding I thought it was an indoctrination period for recruits who had just entered the Communist Party.

242 Q. Do I understand you correctly that David Hyun approached you to attend discussion groups which were designed for the orientation of recruits into the Communist Party, is that correct?

A. I think that's what his intentions were.

243 Q. What caused you to think that these were his intentions?

A. Well, the other people who had attended meetings and were members of the Local 150 group had told me that; as a matter of fact, the meetings up there were dry, and they were members of the Communist Party, as such.

244 Q. Did you attend any of these meetings?

A. No, I did not.

245 Q. Did David Hyun talk to you as a member of the Communist Party?

[fol. 318] A. No, not at the time. I did not know directly whether he was one or not, but my belief that he was one was because of his affiliations with the workers of the union who worked at the union office and who were also members of the Communist Party.

246 Q. You mean these other workers were known to you to be members of the party?

A. Yes.

247 Q. And, as I understand you, David Hyun was closely associated with these members?

A. Yes, he was.

248 Q. Do you recall what David Hyun told you when he approached you to attend the meetings at Dr. Reinecke's house?

A. Not everything that he had said but in part he told me to attend the meetings there, that they were very interesting and that it was a reading and discussion meeting.

249 Q. Did he tell you the subject of these meetings or discussions?

A. No, sir.

250 Q. Do you have any idea what these meetings or discussions concerned?

A. At the time I did not.

251 Q. Do you now?

A. I most certainly do.

252 Q. What did they concern?

A. They concerned Marxism and Leninist theory which [fol. 319] was the basis of the Communist Party movement here in the Territory.

253 Q. How did you subsequently learn the purpose of these meetings?

A. By working up at the office, I had met with different people, different people there that attended meetings there and told me what was carried on at the meetings.

254 Q. Were these people who told you that members of the Communist Party?

A. Yes, they were.

255 Q. Known to you?

A. Known to me.

256 Q. Based upon knowledge you acquired during your membership in the Communist Party, does any reason occur to you why David Hyun would not have disclosed his party membership to you?

A. Well, it could have been because of their strict security measures.

257 Q. You mean by that——

A. Persons who were not officially in or who were just being indoctrinated into the Communist Party were not supposed to know definitely whether an individual was a member of the Communist Party or not.

258 Q. Was there any rule that you recall against one rank and file member of one group or cell disclosing his membership to another rank and file member of another cell?

[fol. 320] A. Yes, the individual who had disclosed information such as you have just stated was subject to dismissal from the Communist Party.

259 Q. Then, if I understand you correctly, it was forbidden that a member of one cell should disclose his membership outside that cell, is that correct?

A. That's correct

260 Q. Based upon your experience in the Communist Party, do you have any reason for doubting that David Hyun was a member of the Communist Party?

A. No reason at all.

261 Q. Do you recall any other incident that would cause you to believe that David Hyun was a member of the Communist Party?

A. Nothing else besides what I have stated already.

262 Q. Who approached you to become a member of the Communist Party?

A. Ernest Arena, Ralph Tokunaga, Ruth Osaki, members who were officials of the I.L.W.U. Local 150.

263 Q. Do you know what official position Dr. John Reinecke had with the Communist Party of Hawaii?

A. No, I do not.

264 Q. Was the exact knowledge of the positions occupied by the higher officers of the Communist Party made known to the rank and file members?

A. Not to my knowledge.

[fol. 321] 265 Q. Will you state again when you first joined the Communist Party?

A. I think it was about the middle of September of—— rather about the middle of 1946 and up to about 1948, '47 or '48.

266 Q. What caused you to leave the Communist Party?

A. The union that we had at the Hawaiian Gas Products in 1947 was disbanded; being that my one business for entering the Communist Party when I did was for the purpose of knowing more about union work, and being that the union was disbanded in '47, why, I felt that it was no use for me to continue and try to find out more about union work.

267 Q. Do you recall a pamphlet which was circulated in the Territory of Hawaii written by Ichiro Izuka?

A. I do.

268 Q. Can you tell us what effect this pamphlet had upon the membership of the cell to which you belonged?

A. It had a very disturbing effect. The members of the different cells at the time the pamphlet came out didn't know what the security measure was at the time, so the people, most of the members of the cell got rid of whatever literature they had and anything that pointed towards them being members of the Communist Party.

269 Q. In other words, the party in Hawaii became very security conscious, about that time?

A. That's right.

[fol. 322] 270 Q. When was the last occasion in which you remember talking with David Hyun?

A. That I cannot recall. It has been so far back.

271 Q. Do you recall any other occasion that you talked with him other than the time when he approached you to

attend the discussion group meetings at Dr. Reinecke's house?

A. Not that I can recall, unless it was outside of the Communist Party.

272 Q. How well did you know David Hyun socially?

A. I knew David Hyun pretty well. He was a member of the Hawaii Defense Volunteer Corps during the Second World War. I was also a member at that time. So our connections were pretty close, being that he and I were in the same outfit. He was 1st sergeant of the company and I was platoon sergeant at the time. And no discussion whatsoever was carried on at the time about the Communist Party movement at all. Later on when the war ended and I had become a member of the I.L.W.U. union of the Territory I had occasion to meet him up there at which time he talked to me about the Communist Party in Hawaii.

273 Q. He did talk to about the Communist Party in Hawaii?

A. Well, not exactly, but he had mentioned the fact that there were discussions up at Dr. Reinecke's home.

274 Q. Concerning Communist Party affairs, is that right?

A. He didn't disclose it at that time. It was a slip of [fol. 323] my tongue when I mentioned the fact that it was Communist Party affairs.

275 Q. But subsequently, as you review this particular conversation you had with David Hyun, does it occur to you that he was talking about the Communist Party at that time?

A. After this happened, yes, he was talking about it.

276 Q. Can you state specifically what he told you about the discussion group held at Dr. Reinecke's house?

A. Well, I had mentioned something about that previously in this statement here, that it was a discussion and meeting group.

277 Q. And the subject matter was to be what?

A. The subject matter was unknown to me at that time.

278 Q. But, as you previously stated, it did become known to you?

A. That's right.

279 Q. At a later date?

A. That's right.

280 Q. After you had become a member of the party?

A. That is true.

The Examining Officer: I have no further question.

The Hearing Officer: The witness is excused.

(Witness excused.)

(The hearing adjourned at 2:00 p.m.)

[fol. 324] I, Albert Grain, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of my stenotype notes in the above entitled matter.

(S.) Albert Grain.

Jan. 2, 1951.

I hereby certify that to the best of my knowledge and belief, the foregoing is a true report of everything that was stated during the course of the hearing, including oaths administered, the warnings given to the alien or the witnesses and the rulings on objections, except statements made off the record.

(S.) Milton T. Simmons, Hearing Officer.

[fol. 325]

1700-1171

December 7, 1950

Mr. David Hyun
C/o Immigration and Naturalization Service,
Detention Quarters,
Terminal Island,
San Pedro, California.

Dear Sir:

Pursuant to the order of Hearing Officer John B. Bartos on November 22, 1950, in your case, depositions will be taken from the following-named persons on December 18th and 19th, 1950, at the Immigration Station, Honolulu, T.H.:

Richard C. Kageyama, Elster J. Doyle, Donald Uesugi, Ichiro Izuka

Your counsel may appear personally or through associate counsel during the taking of these depositions, or

you may submit interrogatories. If interrogatories are submitted, they should arrive in this office not later than 9:00 A.M., December 18, 1950.

Very truly yours,

Air-Mail—Special Delivery—Registered Mail—Return Receipt Requested.

[fol. 326] Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Care.

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(illegible)

2 .....
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

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NO. .....

(5477-5)

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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

October Term, 1955.

No. 201

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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I.

The deportation proceedings at bar, purposed as they were at deportation of a lawfully-admitted, long-resident alien to whom deportation is equitable to the heaviest forfeitures short perhaps of life itself, violated due process and constitutional standards of fair hearing in dispensing totally with the requirement of presence of the accused, and accepting as total evidence of deportability depositions taken without the presence or agreement of the alien or counsel 2500 miles from the place of hearing and residence, and this needlessly and solely to serve government convenience 14

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IN THE

Supreme Court of the United States

October Term, 1955.

No. .....

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on January 31, 1955.

Opinions Below.

The decision of the Hearing Officer of the Immigration and Naturalization Service [S.R. 63-69]*, the decision of

*Signifying pages 63-69 of the Record of the Immigration and Naturalization Service (*i.e.*, Service Record, indicated simply: S.R.) filed in the Transcript of Record herein in two volumes, with continuous, independent pagination, and entitled, "Respondent's Exhibit 'A' in Two Volumes"; citations to the Transcript of Record proper as certified to by the Clerk of the Court of Appeals below are cited merely: R. 1.

the Assistant Commissioner of the Immigration and Naturalization Service [S.R. 9-14] and the decision of the Board of Immigration Appeals, United States Department of Justice [S.R. 4-8] are unreported and are appended hereto as Appendices "B", "C" and "D", respectively. The opinion of the District Court [R. 37] is similarly unreported and is appended hereto as Appendix "E". The opinion of the Circuit Court of Appeals is reported in 219 F. 2d (Adv. Ops.) 404, and is appended hereto as Appendix "A".

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 31, 1955 [R. 54]. Rehearing was denied on April 7, 1955 [R. 55]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether in a deportation proceeding it violates due process and Constitutional standards of fair hearing to take evidence against the alien through *"ex parte* depositions" of witnesses in Hawaii, 2,500 miles from the place of hearing and of the alien's residence, Los Angeles, particularly in consideration that,

(a) the *"ex parte* depositions" constituted not merely a part but the *entirety* of the substantive evidence adduced on behalf of the government, and, being taken, as described, without the presence or agreement of either the alien or his counsel, characterized the hearing as *total* trial in *absentia;*

(b) the deportation proceedings affect a lawfully-admitted, long-resident alien, married to a citizen and father of citizen children, assimilated fully to American habits, language, culture and life;

(c) the procedure of foreign depositions taken away from the place of hearing was required by no consideration of necessity or compelling cause, but was undertaken, and avowedly, merely to serve government convenience and economy.

The Constitutional provision involved is the due process provision of the Fifth Amendment of the United States Constitution reading, "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

Statement of the Case.

The proceedings below were proceedings in habeas corpus initiated by the petitioner here against the district director at Los Angeles of the Immigration and Naturalization Service (respondent here), challenging a final order of deportation against petitioner for denial of procedural due process.

Petitioner was born in Korea in 1917 and is an alien in the sense of accident of place of birth only. In 1924 at the infant age of seven years, petitioner entered the United States, lawfully and for permanent entry, at the port of entry of Hawaii, and ever since that date to the present time petitioner has lived continuously in the United States, with purpose always so to do, and petitioner is at present as demonstrated by the record a person totally assimilated to the culture, values, language and way of life of our society and people. Petitioner is a resident of Los Angeles, California, and is an architect by profession, and is married to a citizen wife and is the father of two children, sons, both citizens by birth. Petitioner is "alien" neither in his own mind nor to his family, his community, or his work, but only to the law.

October 31, 1950 petitioner was arrested in Los Angeles, where he was resident, by warrant of the Immigration and Naturalization Service, and was charged with deportability under the Act of October 16, 1918, as amended, 1950, upon the charge of "[having] been, after entry, a member of the following class set forth in . . . said Act: an Alien who was a member of the Communist Party of the United States." [S.R. 262].

Petitioner was taken into custody and was held continuously and without privilege of bail throughout the entirety of the administrative hearings accorded him, as hereafter described, and until determination of his deportability.

Hearing upon petitioner's case was held in Los Angeles where he was in custody and was resident, the hearing commencing November 22, 1950 [S.R. 69]. Almost at the outset, and after only preliminary matters affecting alienage [S.R. 89], the government moved to take depositions *in Hawaii* of four named persons, to constitute in their sum, as later became clear, the totality of the government's evidence on the substantive issue of the charge, claimed membership after entry in the Communist Party.

As stated, at the time of the motion petitioner was in custody of the respondent and was denied right of bail. At the time of the motion, petitioner was not advised he might attend the depositions, but was informed only that he might "be represented" there "by counsel" [S.R. 93], or might submit written interrogatories [S.R. 93]. Subsequently petitioner was given written notice of the intended place and date of the depositions advising him "your counsel may appear" or representation would be allowed "through associate counsel", but again without

even advising petitioner he might personally attend [S.R. 325]. The notice was delivered to petitioner in confinement [S.R. 325].

Before [S.R. 89-95] and after [S.R. 109-115, 242-249] the motion for and the taking of the depositions, which were taken in Hawaii, December 18, 1950 [S.R. 267 *et seq.*], petitioner through counsel objected to the procedure as violating procedural due process and denying the rights to confrontation of witnesses and to cross-examination, and repeatedly, and earnestly requested that either the witnesses be produced at the hearing, or petitioner, counsel, or both, all alternatively, be transported to the place of the depositions to attend the same. All of these requests and motions were denied [S.R. 90-91, 111, 115, 242, 249]. The Hearing Officer declared and ruled that in deportation proceedings depositions might be taken by the government at its choice, and at whatever place might be convenient, and that attendance there by counsel and/or the individual under charge was a purely civil-litigation concern of such individual, and no more. Further, if counsel did not attend, such was *in se waiver*. (*Ibid.*)

After the depositions had been taken, the government suggested that even the petitioner, despite his custody, "would have been" permitted to attend the depositions in Hawaii, under guard, if he had "requested" so, and "if he could have made the financial arrangements" to pay for conducting himself and personnel sufficient to keep him "under proper safeguards" to Hawaii and return [S.R. 114].

To the objection that it was impossible to cross-examine crucial witnesses by correspondence through interrogatories, and without confrontation, and that no associate

counsel in Hawaii could undertake cross-examination for petitioner without petitioner's attendance and assistance, and to all requests that the government either bring the witnesses to the hearing in Los Angeles or transport petitioner, or counsel, or both to Hawaii for cross-examination, the Hearing Officer ruled flatly, and several times, neither due process nor policy nor any requirement of law burdened the government either to produce its witnesses at the hearing or to transport anyone—alien or counsel—to the place of the taking [S.R. 111, 249, 94-95, 64].

As grounds for its motion to take the depositions in Hawaii the government made no showing or representation of cause or necessity except that the witnesses were residents of Hawaii and that it would serve better the convenience of the government and of such witnesses to have examination by depositions in Hawaii rather than to produce the witnesses at the hearing in Los Angeles [S. R. 94]. Los Angeles is 2,500 miles from Hawaii, and by modern government planes transportation between the two points is a matter of between 8 and 9 hours, or less.

As stated, the depositions were taken December 18, 1950, in Honolulu, Hawaii. At their taking, petitioner was not present nor was he represented by anyone as counsel [S.R. 267-269]. The depositions were taken *ex parte*, by an examining officer and a hearing officer, and these [S.R. 267] not even the officers charged with conducting the proceedings in Los Angeles [S.R. 69; compare S.R. 267]. All of the depositions were taken in a single day, and four persons were affected as witnesses; Richard M. Kageyama [S.R. 269-273], Donald T. Uesugi [S.R. 273-286], Ichiro Izuka [S.R. 286-314], and Easter J. Doyle [S.R. 314-323].

Of the four deponees, one (Kageyama) refused totally to be a witness, invoking the privilege of the Fifth Amendment [S.R. 272]. The other three were examined by the Examining Officer without objections or cross-examination from any source, and without even suggestion of restraint or discipline by the Hearing Officer. The examination was characterized in entirety by grossest impropriety and unfairness in the questioning, including questions crudely, even abusively, leading and suggestive in form and import, and including open and unashamed invitations for conclusions, opinions, and even "guesses" [S.R. 273-323, and especially as illustrative, 275-276, 280-282, 294, 299-303, 317-323].

Despite the character of the examination, deponee Doyle "testified" to nothing of probative import [S.R. 314-323]. His statement was merely that he considered discussions of communism "dry" [S.R. 317] and that David Hyun had "not directly" talked to him of such [S.R. 317], and that he did not "know directly whether he was one [communist party member] or not, but my belief [was] that he was one" [S.R. 318], and that he had "no reason at all" to doubt he was a member [S.R. 320]. The Hearing Officer disallowed Doyle's testimony as without probative significance [S.R. 64].

Deponee Uesugi [S.R. 273-286] as a witness was comparable. Like Doyle's declarations, Uesugi's were declarations solely of conclusions and assumptions. Uesugi declared that a person he identified as petitioner, from a passport photo, was probably a communist party member because seen by him at not more than four to six meetings of people, "I think they are communists" [S.R. 281], at which there occurred discussion "something like concerning labor movements," and assumed by the witness to be

"closed communist meetings" because "they closed the doors" [S.R. 282], and because "I have no reason for believing that he was not a communist" [S.R. 282], and "because it is a meeting and nobody else would be in it" [S.R. 282]. This, in 1946-1948.

The declarations of deponee Izuka [S.R. 286-314] were of like quality and character. Like the others, Izuka spoke, of course, on the basis only of passport photo identification, and on such basis Izuka placed a person identified as petitioner at three meetings believed by him to be "closed" meetings of the "Executive Board" of the Communist Party in Hawaii, whereat he "saw David Hyun representing the Punchbowl group" [S.R. 293], respecting which meetings Izuka declared, "Well, I am sure that all of them were active members in the Communist Party" [S.R. 299]. No other circumstances indicating petitioner was a communist party member existed to his knowledge, Izuka stated, except the foregoing and that petitioner once represented some office workers in a work dispute [S.R. 301]; at no time did Izuka and petitioner ever discuss the Communist Party or communism, but only union matters and social affairs [S.R. 300].

The four *ex parte* depositions constituted the *only* government evidence against the petitioner, and on the basis avowedly thereof the Hearing Officer recommended an order for petitioner's deportation [S.R. 63 *et seq.*].*

---

*Evidence-wise the depositions were supplemented by no other evidence or testimony, and were aided in no way nor even affected by any other matter or circumstance, save the totally privileged circumstance that petitioner, on being examined himself by the government as a witness, invoked the Fifth Amendment's privilege against self-incrimination as to all questions affecting membership in or affiliation to the Communist Party [S.R. 230 *et seq.*], as, of

Repeated requests were made by petitioner to the Hearing Officer after the depositions for production of the witnesses for cross-examination and confrontation, or for transportation of petitioner, or counsel, or both, to the witnesses for confrontation [S.R. 109-115, 242-249]. All such were denied [S.R. 111, 115, 242, 249]. To the arguments of counsel that deportation—and especially deportation of one who has lived for 27 years and since infancy in the United States, and is married to a United States citizen and has citizen children, and therefore has "so much at stake" [S.R. 247] "is not a question of one party suing another party for some money or a judgment or for damages", and is not even to be equated to "an ordinary criminal action" [S.R. 247], but is as serious in its consequence and as a forfeiture as the most serious criminal cause, and requires, and should require, as a condition of due process, the duty of producing witnesses for confrontation and cross-examination of right—particularly where no more is entailed than mere government convenience or minor transportation expense [S.R. 247], the Hearing Officer's reply was a total denial [S.R. 249], with the explanation only,

> "In deportation proceedings the government does not have the burden of sending the respondent or his counsel to the place where the depositions are taken. Therefore, your objection on that ground is overruled." [S.R. 111.]

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course, he had a full constitutional right to do. (*Blau v. United States*, 340 U. S. 159; *Brunner v. United States*, 343 U. S. 918; *Quinn v. United States*, May 23, 1955, 75 S. Ct. (Adv. Ops.) 668, n. 29.) No "evidence" against petitioner can arise from this conduct by him, nor adverse inference be drawn, since petitioner's action was totally privileged and was attended by high Constitutional policy. (*Quinn v. United States*, May 23, 1955, 75 S. Ct. (Adv. Ops.) 668.)

The Assistant Commissioner, Adjudications Division, adopted the decision of the Hearing Officer and ordered deportation [S.R. 9-14]. Respecting the depositions, the Assistant Commissioner in his opinion said only that counsel "protests that the hearing officer permitted depositions to be taken in Hawaii, without providing transportation to that place for the respondent or counsel. The law requires no such provision." [S.R. 13.]

Before the Board of Immigration Appeals, the final and dispositive administrative agency, petitioner additionally and specifically protested against the *ex parte* depositions, and requested that the Board of Appeals order re-opening of the case and order production of the witnesses for confrontation and cross-examination, or transportation of petitioner and counsel to the witnesses for such purposes [S.R. 15-18]. Particular observation was made that procedural due process and essential fairness in a hearing so serious in character as the deportation of one positioned as petitioner was "a burden upon the Government", and fairly so, and in such premises it could not justifiably be urged that "due process can be done away with because it might be somewhat expensive to the Government. * * * expense is not enough to take away due process" [S.R. 18].

The Board of Immigration Appeals affirmed the deportation order [S.R. 4-8], denying the request that it order confrontation, and stating on such score,

> "There is no provision of law or regulations which requires that the United States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the State of California and depositions were taken in Hawaii" [S.R. 7-8].

Thereafter, and after arrest under warrant for deportation dated December 18, 1952 [S.R. 2-3], petitioner filed petition (July 24, 1953) in the District Court below for habeas corpus challenging the validity of the said order and the administrative hearing for denial of procedural due process, insufficiency of evidence, and unconstitutionality in the deportation statute in providing for deportation of persons for mere membership in the Communist Party, *eo nomine,* as a named organization [R. 3-10].

The District Court, after reviewing the record of the administrative proceedings, on August 21, 1953, sustained the order of deportation and denied the petition for habeas corpus [R. 37-38].

Petitioner appealed.

The Circuit Court of Appeals below affirmed the judgment of the Trial Court and sustained the validity of the deportation proceedings and the order for deportation. Respecting the taking of the depositions in Hawaii without confrontation, the Circuit Court of Appeals declared that notwithstanding petitioner's protests that the depositions were taken "while he was in custody" and while he was "financially unable" to transport himself or counsel to Hawaii, and notwithstanding the "plethora of government transportation between Hawaii and the West Coast", and "the comparative financial resources of Hyun and the Government of the United States," no denial of due process was involved because: "Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition * * * We have heretofore decided that the fact that an alien is financially unable to travel to a place where he could cross-examine the witnesses, or send an attorney is not a denial of the right of cross-examination." (Appendix "A".)

Reasons for Granting the Writ.

Introductory Summary.

At bar *ex parte* depositions were used not merely incidentally but as the *total* substantive trial evidence, and thus petitioner was subjected in entirety to trial in *absentia*. The naked right even to be present at one's own hearing was denied, and in consequence there was denial and disregard of the included rights to observe the conduct of one's trial, to confront witnesses, to cross-examine, and the right to assist, and be assisted by, counsel. More, the violations of these basic rights was had *needlessly*, and without compulsion of necessity, and only to accommodate to government convenience and economy.

Furthermore, the inquiry at bar affected a deportation proceeding wherein the gravest of forfeitures and penalties were in balance. Petitioner has been resident in the American community all of the meaningful years of his life, and since earliest childhood, and is married to a citizen and the father of two citizen children. The deportation at bar threatens permanent separation from family and an uprooting of life amounting in fullest measure to banishment and exile. In the premises of such a deportation it can not accord with due process of procedure to permit needless trial in *absentia* and disregard of the basic right of presence of the accused.

The decisions of this Court outside deportation law in both criminal and non-criminal causes make explicit that due process requires mandatory presence of the person charged in all proceedings seriously affecting liberty, per-

son or life, save as qualified only by necessity. Like considerations of both principle and policy apply in the case at bar.

That the proceedings are technically "civil" does not answer the issues posed. Fair procedure in causes seriously affecting liberty, person or life is a matter not merely of private concern, as a property issue might be, but a matter of deepest self-interest to *all society,* and fairness of judgment is required there mandatorily *by the Constitution.* Society cannot afford to be careless as to liberty, person or death.

The issues involved at bar rise far beyond the individual case of petitioner and presents a fearsome precedent. A ruling is sought at bar by the government to so limit procedural rights in deportation as to permit taking of *ex parte* depositions far removed from the place of hearing and without provision for attendance by the alien or counsel, in any deportation proceedings at the pleasure of the government. If such a precedent be established the spectacle is presented of possible wholesale use of depositions, particularly in political deportations, with accusations made *ex parte,* and by informer-accomplice witnesses, without check or restraint whatever by confrontation or cross-examination.

I.

The Deportation Proceedings at Bar, Purposed as They Were at Deportation of a Lawfully-Admitted, Long-Resident Alien to Whom Deportation Is Equitable to the Heaviest Forfeitures Short Perhaps of Life Itself, Violated Due Process and Constitutional Standards of Fair Hearing in Dispensing Totally With the Requirement of Presence of the Accused, and Accepting as Total Evidence of Deportability Depositions Taken Without the Presence or Agreement of the Alien or Counsel 2500 Miles From the Place of Hearing and Residence, and This Needlessly and Solely to Serve Government Convenience.

1. The Requirements of Procedural Due Process Apply to and Condition Deportation Proceedings.

Although the decisions of this Court affecting *substantive* deportation power, appear at times to assume in Congress as to enactment of substantive grounds for deportability "plenary" or little-limited constitutional power (*Galvan v. Press,* 347 U. S. 522; *Harisiades v. Shaughnessy,* 342 U. S. 580; *Carlson v. Landon,* 342 U. S. 524*), and although such decisions have likewise on occasions

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*Albeit depended largely upon precedents viewed as compelling and mandatory which in their own premises are either dicta on the subject here, or were concerned only with exclusion, not deportation, or so confused those two issues as to give no separate analysis, and this notwithstanding that now the two issues of deportation and exclusion are marked as constitutionally, as well as logically, distinct subjects of rights. (See *e.g., Nishimura Ekiu v. United States,* 142 U. S. 651 (exclusion), cited in *Carlson v. Landon,* n. 18; *Ng Fung Ho v. White,* 259 U. S. 276 (dicta), cited in *Galvan v. Press,* p. 532; *Bugajewitz v. Adams,* 228 U. S. 585 (dicta), cited in both *Carlson* and *Galvan* at the notations above given;

stated deportation proceedings are "civil" rather than "criminal" in technical character and that in consequence certain specific constitutional sections and provisions do not there apply, as, for example, the provisions affecting bills of attainder, *ex post facto* laws and jury trials (*Harisiades v. Shaughnessy, supra; Bugajewitz v. Adams,* 228 U. S. 585; *Carlson v. Landon, supra,* at p. 537), nonetheless it is undisputedly the law that *procedural due process* as a constitutional guarantee does apply to and condition deportation proceedings, and that the hearing given persons charged with deportability must be constitutionally fair and must respect fundamental safeguards of procedure. (*Kwock Jan Fat v. White,* 253 U. S. 454, 457; *Yamataya v. Fisher,* 189 U. S. 86, 100-101; *Kwong Hai Chew v. Colding,* 344 U. S. 590, 595-598; *Wong Yang Sung v. McGrath,* 339 U. S. 33, 49; *Heikkila v. Barber,* 345 U. S. 229, 234; *Johnson v. Eisentrager,* 339 U. S. 763, 770-771; *Bridges v. Wixon,* 326 U. S. 135, 153-154; *Kessler v. Strecker,* 307 U. S. 22, 34; *Shaughnessy v. Mezei,* 345 U. S. 206, 212; *Galvan v. Press,* 347 U. S. 522, 531; *Carlson v. Landon,* 342 U. S. 524, 537; *United States ex rel. Vajtauer v. Commissioner,* 273 U. S. 103, 106; *United*

Fong Yue Ting v. United States, 149 U. S. 698, parent case of all, cited in *Carlson* and *Galvan, supra,* and in *Harisiades v. United States,* n. 11, undermined fundamentally as precedent now because based on assumed power to discriminate in deportation on basis of *race* alone, whereas government action discriminating on basis of race is now accepted as violating at the roots the limitations of the Constitution—see, *e.g., Shelley v. Kraemer,* 334 U. S. 1; *Barrows v. Jackson,* 346 U. S. 249, and *Brown v. Board of Education,* 347 U. S. 483, second opinion, 75 S. Ct. (Adv. Ops.) 753; *Bolling v. Sharpe,* 347 U. S. 497, second opinion, 75 S. Ct. (Adv. Ops.) 753.

States ex rel. Bilokumsky v. Tod, 263 U. S. 149, 156-157; *Tang Tun v. Edsell,* 223 U. S. 673, 681-682.)

Inquiry and hearing "full and fair" (*Johnson v. Eisentrager, supra,* 339 U. S. at 771; *United States ex rel. Vajtauer v. Commissioner, supra,* 273 U. S. at 106) in deportation proceedings is "required by the Constitution" (*Heikkila v. Barber, supra,* 345 U. S. at 235), as a matter of "paramount law" (*Carlson v. Landon, supra,* 342 U. S. at 537; *Fong Yue Ting v. United States,* 149 U. S. 698, 713).

> "[Without] such hearing, there would be no constitutional authority for deportation, [since] the constitutional requirement of procedural due process . . . derives from the same source as Congress' power to legislate . . ."
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> *Wong Yang Sung v. McGrath, supra,* 339 U. S. at 49.

> "It is well established that if an alien is a lawful permanent resident of the United States . . . he is a person within the protection of the Fifth Amendment . . . [and] not even Congress may expel him without allowing him a fair opportunity to be heard."
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> *Kwong Hai Chew v. Colding, supra,* 344 U. S. at 596-598.

2. The Central-core Requirement of Procedural Due Process Is Fairness Appropriate to the Seriousness of the Cause —Qualified Only by Necessity. Under This, by Settled Law, Presence of the Person Charged Is Mandatory by Due Process in Hearings Affecting Liberty, Person or Life Outside Deportation Law, as to Both Criminal and Non-criminal Causes.

A. THE CORE-PRINCIPLE OF DUE PROCESS IS FAIRNESS APPROPRIATE TO THE SERIOUSNESS OF THE CAUSE, QUALIFIED ONLY BY NECESSITY.

Fairness of hearing is "due process in the primary sense". (*Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673, 681.) Its content derives from "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Snyder v. Massachusetts,* 291 U. S. 97, 105.) It is foundationed on the fact that in our democratic society "respect for the dignity of all men is central" (*McNabb v. United States,* 318 U. S. 332, 343), and from the principle that ours "is government of *laws,* not of *men.*" (*Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 177, Mr. Justice Douglas, concurring.)

Of course, both the seriousness of the cause and the practicalities of necessity may affect in a reasonable measure the content of the rights secured. What is of small consequence may sensibly be given small hearing. Similarly, what is required by necessity must be accommodated to in the field of fair hearing as in all areas of law. A $5 matter does not warrant a $500 hearing; and where a fire jeopardizes life within ten minutes, ten days of notice or of trial cannot be required. But where serious issues of liberty, person or life are at stake, the requirement of fair hearing insured by due process of law re-

quires observation of all procedural rights needful to fairness, save only as conditioned by necessity. (*Mattox v. United States,* 156 U. S. 237, 243; *Cooke v. United States,* 267 U. S. 517, 636-637; *In re Oliver,* 333 U. S. 257, 274; *Anderson v. Dunn,* 6 Wheat. (19 U. S.) 204, 231; *Offutt v. United States,* 348 U. S. (Adv. Ops.) 11, 14, 75 S. Ct. (Adv. Ops.) 11, 13; *Ownbey v. Morgan,* 256 U. S. 94, 102-104; *Endicott Co. v. Encyclopedia Press,* 266 U. S. 285, 288-289.) Absent necessity, or rare exception born of practical circumstance or of history, what is required to be fair, is required by due process.

> "The high social and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances when we have sustained executive action even though it did not observe customary standards of procedural fairness."
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> *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 167, Frankfurter, J., concurring.

The pervasive reach and the unyielding character of due process securities of fair procedure reflect the circumstance, pregnant with significance, "that most of the provisions of the Bill of Rights are procedural" (*Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 179, Douglas, J., concurring), and the stated conviction of this Court that "[the] history of liberty has largely been the history of observance of procedural safeguards" (*McNabb v. United States,* 318 U. S. 332, 347).

B. Presence of the Person Charged Is Mandatory by Due Process in Hearings in Criminal Causes.

The right of presence at one's trial is "one of the fundamental guarantees of life and liberty" (*Kirby v. United States,* 174 U. S. 47, 55), and it is regarded in criminal matters "as being scarcely less important to the accused than the right of trial itself" (*Diaz v. United States,* 223 U. S. 442, 455). It is a "leading principle [which] pervades the entire law of criminal procedure . . . that, after indictment found, nothing shall be done in the absence of the prisoner" (*Lewis v. United States,* 146 U. S. 370, 372).

The purpose and significance of the right of presence is several-sided. Actually it is a right which is a precondition of, and hence includes either partially or wholly, several independent and separable rights, including most importantly the rights of confrontation, observation and cross-examination, and the right to assist, and be assisted by, counsel. (V Wigmore on Evidence, Ch. XLVII; *Dowdell v. United States,* 221 U. S. 325, 330.) The basis for its guarantee is its plain necessity to fair hearing; it is indispensable as a safeguard against either witting wrong or unwitting error.

> "The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind, [and necessary to this is accurate judgment and fair trial, to which it is utterly indispensable that the accused] be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceeding against him. If he be deprived of his life or liberty without being so

present, such deprivation would be without that due process of law required by the Constitution."

Hopt v. Utah, 110 U. S. 574, 579.

Whether established so in an individual case or not, "personal presence of the accused from the beginning to the end of a trial . . . must be assumed to be . . . vital to . . . defense, and cannot be dispensed with." (*Schwab v. Berggren,* 143 U. S. 442, 448.) A right to trial at all "implies that [the accused] shall have a right to be present." (*Schwab v. Berggren,* 143 U. S. 442, 450.)

A provision securing the right of presence "is found in the constitutions of [all] the several States, and . . . is embodied in the Sixth Amendment to the Constitution of the United States." (*Diaz v. United States,* 223 U. S. 442, 454-455.) And, apart from such specific provisions, as to all portions of hearings having basic import, "the presence of a defendant is a condition of due process" under the Federal Constitution, because deemed to such extent indispensable to "a fair and just hearing." (*Snyder v. Massachusetts,* 291 U. S. 97, 107-108.)

> "Our traditions, the Bills of Rights of our federal and state constitutions, state legislation and the decisions of the courts of the nation and the states, unite in testimony that the privilege of the accused to be present throughout his trial is of the very essence of due process. * * * In the light of the universal acceptance of this fundamental rule of fairness . . . it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule."
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> *Snyder v. Massachusetts,* 291 U. S. 97, 128-131, Roberts, J., dissenting on other grounds not here material.

The use of depositions without confrontation cannot be squared in criminal hearings with the mandatory requirement of presence of the accused. Hence in such proceedings such procedure is constitutionally disallowed.

> "This provision [right of presence] . . . intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witness as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of . . . cross-examination."
>
> *Dowdell v. United States,* 221 U. S. 325, 330.

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . ."
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> *Mattox v. United States,* 156 U. S. 237, 242.

C. Presence of the Person Charged Is Mandatory by Due Process in Non-criminal Proceedings Outside Deportation Law Affecting Liberty, Person or Life.

Though like deportation proceedings not deemed to be protected by strictly criminal constitutional provisions, non-criminal hearings affecting liberty, person or life outside deportation law requires presence of the person charged as a condition of due process as fully as do proceedings criminal in nature, and by settled law. Notable are confinement proceedings based upon psychopathy

charges or upon claims of insanity, and proceedings held to authorize asexualization operations or other acts jeopardizing life or person.

Insanity and psychopathy confinement proceedings are not purposed at punishment but rather at treatment and rehabilitation. Notwithstanding this, it is firmly established law that in such proceedings presence of the person charged is jurisdictional to a fair and constitutional hearing, save only where reasonably feared as dangerous to the accused or to others. (*Simon v. Craft,* 182 U. S. 427; *Chaloner v. Sherman,* 242 U. S. 455; *Pearson v. Probate Court,* 309 U. S. 270, 275-7; *In re Lambert,* 134 Cal. 626, 633; 28 Am. Jur. 665-6; 12 Am. Jur. 286-7; 16 C. J. S. 1194-5; Comment, "Habeas Corpus and Commitment of the Mentally Ill," 10 Ohio St. L. J. 376-382.) Such proceedings are so serious in nature they require "every proper safeguard." (*In re Moynihan* (Mo.), 625 S. W. 2d 410, 416.) So basic is the right of presence in such proceedings that it will be presumed any exercise of custody is purposed at insuring, not preventing, attendance, since it is "the absolute duty" of all officers of law to insure attendance of persons affected at such hearings "if . . . fit to attend . . ." (*Simon v. Craft, supra,* 182 U. S. at 436.) This Court, in *Pearson v. Probate Court,* stated: "We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity . . . and the special importance of maintaining the basic interests of liberty" in such cases (309 U. S. 270, 276-7).

Like scrupulous regard for due process, including mandatory requirement of the presence of the person affected, obtains in proceedings directed at authorizing asexualization operations or other medical actions jeopardizing life

or person, although such proceedings are also purposed at ends other than criminal punishment. (*Buck v. Bell,* 274 U. S. 200, 206; *Williams v. Smith,* 190 Ind. 526, 131 N. E. 2; *Brewer v. Valk,* 204 N. C. 186, 167 S. E. 638, 87 A. L. R. 237; Annotation, "Asexualization or Sterilization of Criminals or Defectives," 40 A. L. R. 535, supplemented in 51 A. L. R. 862 and 87 A. L. R. 242.)

The short of it is that it could not be conceived of under due process of law that a person proceeded against under insanity, psychopathy or asexualization proceedings, or other proceedings of like nature affecting liberty, person or life, could be heard without presence, notwithstanding the circumstances that the object of government is not criminal punishment.

3. On Like Scores Fair Hearing Makes Presence of the Person Charged Similarly Mandatory in Deportation Proceedings, and Denial of Such Mandatory Right Violates Due Process. Particularly Is This so in the Premises at Bar Where the Violation of the Right of Presence (1) Was Total, (2) Was Needless, (3) Concerned a Hearing Wherein Most Grievious Forfeitures Were Factually at Stake Should Deportation Be Ordered, and (4) Was Otherwise Aggravated in Consequence.

A. THE VIOLATION OF THE RIGHT OF PRESENCE AT BAR WAS TOTAL—THE TRIAL WAS TOTALLY TRIAL IN ABSENTIA.

Trial without presence is not even the appearance of fair trial.

As set forth in the Statement of the Case, *supra,* the instant case involves not merely the use of an incidental deposition but the presentation by deposition, taken without the presence or agreement of petitioner or his counsel, of *the entirety of the substantive evidence of deportability.*

This is *total trial in absentia*. The vice of foreign depositions assumes at bar, therefore, in substance, the qualitative degree of *total* impropriety of method of trial, not merely partial violation of form or right. Unless condemnation in deportation may be had without any requirement of presence at all, the proceedings below must fail.

Fairness of hearing in all serious causes is the concern of all society, for violation of rights or unfairness of judgment as to one person undermines security for all others. "The public has an interest in [every accused's] life and liberty" (*Lewis v. United States*, 146 U. S. 370, 374), and the requirement of due process is "that justice must not only be done but must manifestly be seen to be done." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 172, n. 19, Frankfurter, J., concurring, quoting the English decision, *Rex v. Bodmin Justices* (1947), 1 K. B. 321, 325). *Total trial in absentia* in a proceeding affecting liberty and most grievous forfeitures, as at bar, cannot be thought to be "justice . . . seen to be done."

B. The Violation of the Right of Presence Below Was Needless and Was Had Only to Suit Government Convenience and Economy.

Particularly to be noted at bar is the consideration and circumstance that denial of the safeguard of presence of the accused below was undertaken out of no reason of necessity but solely for government convenience and accommodation. The witnesses whose depositions were taken all resided in Hawaii and were within federal jurisdiction and fully answerable to compulsory federal process, and could have been produced by the government at the hearing had the government undertaken so to do. They were not produced simply because appearance in

Hawaii by deposition suited government convenience and economy only. Thus the instant case carries a fearsome precedent—trial without presence in deportation where such suits administrative pleasure and choice.

It was conceded below by the government [S.R. 242-246] that deportation witnesses within the United States (and Hawaii is no different) are on occasion moved by the government from one place to another to permit production at place of hearing for purposes of confrontation and cross-examination, the example given being the production at various political deportation hearings of the witness Paul Crouch. The government seeks here a ruling that such production is at pleasure and not of right. If such precedent be established the spectacle is presented of possible wholesale deportation trials in *absentia* with accusations made by informer witnesses in New York or Washington, D. C., on wholesale scale, while the hapless alien victims are miles removed in California or other distant points, and where the breaking of life and family is had totally *ex parte* and without check or restraint whatever by confrontation or cross-examination.

Under the law, where the right of presence obtains at all disregard of it may be justified only by necessity. Subsumed within presence are the included rights to confront witnesses, to cross-examine, to observe the conduct of one's trial, and the right to assist, and be assisted by, counsel. Disregard of such fundamentals of fair hearings can only be justified by compelling necessity.

Where a witness cannot be produced at the place and forum of hearing because dead, ill, insane, or beyond the physical jurisdiction of the hearing tribunal, if the testimony is available in a form taken under oath, as by deposition or at a preliminary proceeding or prior trial, or if

uttered as a dying declaration, due process, out of *necessity* only, accepts the testimony without appearance. But this is by force of irremediable circumstances only, not in any measure to accommodate to pleasure or convenience merely. (*Kirby v. United States,* 174 U. S. 47, 61; *Motes v. United States,* 178 U. S. 458; *Mattox v. United States,* 156 U. S. 237, 242-3; *Dowdell v. United States,* 221 U. S. 325, 329 *et seq.; West v. Louisiana,* 194 U. S. 258; *Reynolds v. United States,* 98 U. S. 145; *Diaz v. United States,* 223 U. S. 442.)

To tolerate violations of any of the basic safeguards of fair hearing in trials affecting liberty, person or life *needlessly* and to accommodate convenience and government economy only, misconceives fundamentally the function of due process of procedure in society. Disposing of liberty and like personal rights is a most serious matter—to all men, in and outside the particular cause. Such matters are not to be equated to or balanced against government convenience, economy or pleasure. With respect to them the requirement of government is to *insure,* not merely *tolerate,* fairness, and convenience and economy have no fair weight because opposed by values priceless by very definition. Hence needless violations of rights important to fairness in trials affecting liberty, person or life deny fundamentally the dignity and value of men and thereby offend "law of the land."

C. THE CONSEQUENCES AT STAKE IN DEPORTATION PROCEEDINGS CAN BE AND AT BAR WERE AS SERIOUS AND PENALIZING AS THOSE IN CRIMINAL PROCEEDINGS PROPER.

Where as at bar deportation affects an alien with "roots . . . deeply fixed in this land" (*Bridges v. Wixon,* 326 U. S. 135, 154), who has become a "part of the American community" (*Galvan v. Press,* 347 U. S. 522, 530), deportation is in its consequences "the equivalent of banishment or exile." (*Fong Haw Tan v. Phelan,* 333 U. S. 6, 10; *Jordan v. De George,* 341 U. S. 223, 231.) It may result in loss "of all that makes life worth living." (*Ng Fung Ho v. White,* 259 U. S. 276, 284.) In such settings it cannot be gainsaid that for the alien "the stakes [are] indeed high and momentous." (*Delgadillo v. Carmichael,* 332 U. S. 388, 391.) Indeed, "in the present upheavals in lands to which aliens may be returned [jeopardy may exist even] to life itself." (*Wong Yan Sung v. McGrath,* 339 U. S. 33, 50.)

Because of this, at least in cases factually involving the features of grievous forfeiture and exile, "meticulous care" must be exercised to guarantee hearings meeting "the essential standards of fairness." (*Bridges v. Wixon,* 326 U. S. 135, 154.)

Hence it is that this Court on numerous scores has applied in deportation proceedings principles protective of individual rights and fair hearing deriving in origin from criminal law causes, including the void for vagueness test as to the validity of statutes (*Jordan v. De George,* 341 U. S. 223, 231), the principle of narrow construction of

laws (*Delgadillo v. Carmichael,* 332 U. S. 388; *Fong Haw Tan v. Phelan,* 333 U. S. 6, 10), and a presumption of defense approaching closely the criminal law presumption of innocence (*Kwock Jan Fat v. White,* 253 U. S. 454, 464; *Baumgartner v. United States,* 322 U. S. 665; *Schneiderman v. United States,* 320 U. S. 118).

The deportation forfeitures factually involved at bar, as set forth in the Statement of the Case, *supra,* are of such quality and number as to equal, and indeed in features surpass, the consequences in criminal proceedings of even the most serious nature. At bar there is posed deportation of an individually lawfully admitted to the United States, who has lived all the meaningful years of his life, all years since merest childhood, in this country, and who is tied to this land by marriage, by fatherhood, by language, and by custom, culture and fullest assimilation, and to whom all other lands are alien and unknown. More, there obtains at bar jeopardy even to life. Such jeopardy attends particularly, if not exclusively, political deportations, and such is the deportation at bar. Moreover, the order of expulsion below is directed to South Korea, a land wherein, as evidenced by circumstances judicially noticeable by this Court and widely commented upon by informed and able observers, there has been secured in the recent past small guarantee even for life or person where political dissent has been manifested or upturned*

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*At bar an application was made and granted for an administrative order staying temporarily deportation to South Korea (though not elsewhere) because of jeopardy of physical persecution, and such stay is presently in effect. However, stay orders of this character are discretionary, and temporary only, under the statutes, and do not eliminate jeopardy since they are subject to recall with no certainty of right.

In fine, the premises at bar exemplify deportation in its most jeopardous and hurt-inflicting form. In such a proceeding due process, if it is to be meaningful at all, must secure fairness of hearing measured by at least the *minimals* of fairness required in criminal and non-criminal proceedings outside deportation affecting liberty, person or life, including in particular the foundational safeguard of mandatory presence of the person charged.

Petitioner at bar forfeits family, liberty and homeland, and faces literal "banishment and exile," if deportation be had, and it cannot accord with reason to suggest that such can be imposed upon him with less regard for fair hearing because only inflicted in deportation proceedings. It denies all substance in law to say the Constitution in securing fair hearing regards less a man's life, because only government chooses the form and forum of deportation rather than of criminal charge under which to move.

Forcible, total and permanent separation from wife and children, loved and loving as at bar, is a forfeiture which in itself is exceeded by few criminal penalties, if any, in severity. Deportation threatens such. Again, consider the consequences of exile as a forfeiture. Banishment from one's homeland to roam the world at large—such would be unconstitutional as "cruel and unusual punishment" if imposed as a criminal forfeiture, no matter by how fair a hearing guilt might be found. It accords little with fair policy to suggest such punishment, so grievous in nature as to "fit" no possible crime, can yet be validly inflicted without even fairness in hearing because only government acts in the name and form of deportation proceedings. Even though not techn'cally criminal in character, deportation proceedings require in reason, where

they equal or surpass the seriousness of criminal causes, equality in security of fairness of hearing.

It is error therefore to say, as did the Court of Appeals below, that because deportation is "civil" the accused person "need not be confronted by the witnesses [and] evidence may be taken by depositions," and "financial inability of an alien to insure attendance of himself or his attorney . . . is not a denial of due process." Where civil matters amount merely to private contests over property rights, there is fairness in saying that rights not asserted even at premium of distant action, likely represent merely reasonable compromises had after balance of costs against stakes, and that what is ill defended is likely also small of value. It is otherwise where "civil" proceedings affect forfeiture of liberty, person or life, and where the proceedings are government-instituted and involuntary. There a fair hearing must be *provided,* not merely not be prohibited, and there foreign depositions without confrontation cannot be had for considerations of convenience alone, without violating fundamental constitutional requirements of fair play. Human injury, whether purposed by society or not, requires hearing commensurate with its nature. Before heavy blows, there must be fairest hearing —and this without regard for fine distinctions as to purpose.

Society cannot afford to be careless with liberty, person or death.

D. The Character of the Examination and Witnesses in the Depositions at Bar Particularly Required Confrontation and Cross-Examination.

As set forth in the Statement of the Case, *supra*, the depositions at bar were not only taken *ex parte*, but were characterized additionally by particularly objectionable features of examination, and by other weaknesses.

The witnesses were interrogated by extreme leading examination and were invited to testify in terms purely of conclusions and of opinions expressed without foundation or even clarity and freedom from ambiguity; they were even encouraged to guess. Indeed, they were asked in their interrogation to state whether as witnesses they had "no reason to doubt" the charges against petitioner [S.R. 320].

Additionally, the witnesses were accomplices, and informers, and their testimony as such was therefore particularly requiring of confrontation and cross-examination. Furthermore, "identification" of petitioner in all instances was by "passport photo" only, hardly a basis to be welcomed as foundation for destroying life, family and liberty.

The character of the depositions at bar, therefore, particularly required observation at bar of the requirements of presence, confrontation and cross-examination.

E. The Depositions at Bar Were Within the Area of the First Amendment.

A final circumstance aggravating the vice of denying below a hearing safeguarded by presence of the accused and counsel is the fact that the charge and testimony in the case at bar fell definitionally within the area of asso-

ciation, assembly, speech and opinion, protected in the first instance by the First Amendment.

The Constitution requires particularly jealous and exacting inquiry where limitations of right affect the area of the First Amendment, whether the issue of limitation arises as one primarily of fact (*Pennekamp v. Florida,* 328 U. S. 331, 335; *Cantwell v. Connecticut,* 310 U. S. 296; *Craig v. Harney,* 331 U. S. 367, 373; *Fiske v. Kansas,* 274 U. S. 380, 385), or of law, policy and interpretation (*Winters v. New York,* 333 U. S. 507; *United States v. Carolene Products Co.,* 304 U. S. 144, 152, n. 4; *Thornhill v. Alabama,* 310 U. S. 88, 95; *Schneider v. State of New Jersey,* 308 U. S. 147, 161; *Bridges v. California,* 314 U. S. 252, 262-3).

Grave danger even to citizen speech and association lies in permitting in deportation hearings penalties on speech safeguarded so little by rules of fair hearing as to reduce guilt to matters only of merest association, or of conjecture, surmise or malice expressed only by witnesses examined without the safeguard of the presence of either the accused or his counsel.

Conclusion.

Wherefore, the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

JOHN W. PORTER,
Attorney for Petitioner.

WILLIAM B. MURRISH,
HERBERT W. SIMMONS, JR.,
Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

David Hyun, appellant, vs. Herman R. Landon, District Director, Immigration and Naturalization Service, appellee. No. 14,058.

January 31, 1955.

Appeal from the United States District Court, Southern District of California, Central Division.

Before: STEPHENS and CHAMBERS, Circuit Judges, and CLARK, District Judge.

STEPHENS, Circuit Judge:

David Hyun appeals from a judgment of the United States District Court, denying and dismissing his petition for the writ of habeas corpus in which appellant sought release from the custody of appellee who was holding him under a final order of deportation. Appellee Landon is the District Director of the Immigration and Naturalization Service.

Appellant is a native of Korea and asserts citizenship of China. He was admitted to the United States at Honolulu. Territory of Hawaii, on May 26, 1924, at which time he was seven years old. He was admitted to the continental United States at Los Angeles, California, on September 1, 1947. A warrant for his arrest in deportation proceedings was issued and served on him on October 21, 1950, in which appellant was charged as an alien who, after entry, had been a member of the Communist

Party of the United States.[1] Pursuant to the warrant, Hyun was taken into custody pending determination of his deportability.

Hearings were started on November 22, 1950, at which time the hearing officer granted a motion by the examining officer to take the depositions of four witnesses in Honolulu. Timely notice was given and appellant's counsel was informed that appellant could be present, could submit written interrogatories and could present witnesses, or could be represented by counsel. Accordingly, depositions were taken in Honolulu on December 18, 1950, but appellant was not present or represented. Nor did he submit direct interrogatories.

On March 28 and 29, 1951, the deportation hearing was resumed, at which time appellant's counsel made specific objections to certain questions and answers contained in the Honolulu depositions. At this time appellant disclaimed any desire to present cross interrogatories to the Honolulu witnesses or to present witnesses of his own. Appellant testified but refused to answer any question concerning communist party membership on the grounds that it might tend to incriminate him and that it violated his rights under the first amendment to the Constitution of the United States. On April 19, 1951, appellant once again stated that he would not submit cross interrogatories to the Honolulu witnesses. The hearing officer, relying only on the depositions of Uesugi and Izuka, found the appellant deportable. The finding of the hearing officer

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[1]The warrant charged Hyun with deportability for violation of the "Act of October 16, 1918, as amended, in that he has been after entry a member of the following class set forth in § 1(2)(c) of said Act: an alien who was a member of the Communist Party of the United States. 8 U.S.C.A. 137(2)(c) 1951 pocket part."

was adopted by the Assistant Commissioner and appellant was ordered deported. Subsequently, the Board of Immigration Appeals dismissed appellant's appeal and the action from which the instant appeal is taken was filed on July 24, 1953.

THE TAKING OF THE DEPOSITIONS IN HAWAII

It is contended by appellant that the action of the immigration Service in taking the depositions of Uesugi and Izuka in Honolulu, while he was in custody in California, deprived him of the essential ingredients of due process of law. The argument is that not only was Hyun in the custody of appellee at the time the depositions were taken but that he was financially unable to transport his counsel to Honolulu or procure Honolulu counsel to represent him at the depositions. In view of the comparative financial resources of Hyun and the government of the United States, and in further consideration of the plethora of government transportation between Hawaii and the west coast, it is appellant's contention that the government should have transported the witnesses to the west coast for the depositions, or in the alternative provided transportation to Hawaii for Hyun and his attorney. Failure to do either, it is alleged, deprived appellant of essential ingredients of due process of law.[2]

An alien in deportation proceedings must be afforded due process of law, including a fair hearing, Wong Yang Sung v. McGrath, 339 U. S. 33, and indispensable to a fair hearing are reasonable notice, the right to examine

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[2]Circumstances relating to adequate counsel for persons charged with Communist adherence indicate that it would not be unreasonable for the trier of fact to disbelieve that appellant could not be represented at the Honolulu hearings.

witnesses and to testify and to present witnesses and to be represented by counsel, all of which appellant had. This court has repeatedly held that financial inability of an alien to insure attendance of himself or his attorney, or both, at the place where depositions are being taken is not a denial of due process. As was stated in Bhagat Singh v. McGrath, 1939, 9 Cir., 104 F. 2d 122, 123:

> "Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition * * * We have heretofore decided that the fact that an alien is financially unable to travel to a place where he could cross examine the witnesses, or send an attorney is not a denial of the right of cross examination."

See also Channan Singh v. Haff, 1939, 9 Cir., 103 F. 2d 303; and Kishan Singh v. Director, 1936, 9 Cir., 83 F. 2d 95. See, too, Berkman v. Tillinghast, 1932, 1 Cir., 58 F. 2d 621, 622; Hale v. Henkel, 1906, 201 U. S. 43.

Cases cited by appellant to sustain the view that the government erred in not insuring the presence of Hyun at the taking of the depositions, are not applicable to the instant case:

Maltez v. Nagle, 1928, 9 Cir., 27 F. 2d 835—The hearing officer refused to produce for examination persons whose statements were *ex parte;*

Caranica v. Nagle, 1928, 9 Cir., 23 F. 2d 545—It was held that the hearing was not unfair where cross examination was not allowed as to a witness whose testimony had been received but whose testimoney was not considered as to the decision;

In re Sugano, 1930, D. C., Calif., 40 F. 2d 961—The hearing was held unfair where proper cross-examination had been denied.

Failure to assert one's rights merely because to do so would necessitate some inconvenience can only be construed as a waiver of the right. Kishan Singh v. Director, 1936, 9 Cir., 83 F. 2d 95.

Rulings of the Hearing Officer

When the depositions of the Honolulu witnesses were offered in evidence at the Los Angeles hearings of March 28 and 29, 1951, appellant objected to certain of the questions or answers which he felt were improper under established rules of evidence. The hearing officer seriatim overruled appellant's objections. Appellant argues that this action of the hearing officer admitted a mass of incompetent evidence which fatally corrupted both the hearing and the record. It was strongly stated by appellant's counsel both in the briefs and at the hearing that the conduct of the presiding officer bespoke "a marked lack of that degree of judicial objectivity which a fair hearing connotes." It would seem clear that the action of the hearing officer in rejecting all of appellant's motions and objections was not in and of itself a denial of due process of law, without a showing that the objections were well taken, and that the action actually resulted in a denial of due process.

It is well settled that the power of Congress to regulate the deportation of aliens is plenary and only in the case of extreme abuse will the courts intervene. As stated in Carlson v. Landon, 1952, 342 U. S. 524, 536, "* * * it is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country is deemed hurtful." See also: Harisiades v. Shaughnessy, 1952, 342 U. S. 580; Shaughnessy v. Mezei, 1953, 345 U. S. 206; Bugajewitz v. Adams, 1913, 228

U. S. 585, 591; Ng Fung Ho v. White, 1922, 259 U. S. 276, 280; Ocon v. Landon, Dec. 1954, 9 Cir., ... F. 2d .....; Galvan v. Press, 1953, 9 Cir., 201 F. 2d 302; Carlson v. Landon, 1950, 9 Cir., 186 F. 2d 183. Consequently, when the Supreme Court held the provisions of the Administrative Procedures Act[3] applicable to deportation hearings, Sung v. McGrath, 1950, 339 U. S. 333, Congress subsequently specifically exempted such proceedings from the requirements of the Act.[4] The procedure to be followed in deportation proceedings is presently embodied in the Immigration and Nationality Act.[5] Marcello v. Ahrens, 1954, 5 Cir., 212 F. 2d 830, 836; Galvan v. Press, 1953, 9 Cir., 201 F. 2d 302, 304.

In this connection it is settled that deportation proceedings are civil in nature, not criminal. Carlson v. Landon, 1952, 342 U. S. 524; Bhagat Singh v. McGrath, 1939, 9 Cir., 104 F. 2d 122.

Traditionally, the formal exclusionary rules of evidence present in judicial proceedings have been relaxed in administrative practice. As stated by this court in Scheeps v. Carmichael, 1949, 9 Cir., 177 F. 2d 391, 395: "Common law rules of evidence are not based in constitutional interdictions and administrative tribunals are not bound

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[3]Title 5 U.S.C.A. §1001 et seq., June 11, 1946, c. 324, §2, 60 Stat. 237; as amended Aug. 8, 1946, c. 870, Title III, §302, 60 Stat. 918; Aug. 10, 1946, c. 951, Title VI, §601, 60 Stat. 993; March 31, 1947, c. 30, §6(a), 61 Stat. 37; June 30, 1947, c. 163, Title II, §210, 61 Stat. 201; March 30, 1948, c. 161, Title III, §301, 62 Stat. 99.

[4]Supp. Approp. Bill Rider, Sept. 27, 1950, 64 Stat. 1048.

[5]Title 8 U.S.C.A. §1252(b), June 27, 1952, c. 477, Title II, ch. 5, §242, 66 Stat. 208.

by such rules except those perpetuated in governing relations." See also the following cases by this court:

Willapoint Oysters v. Ewing, 1949, 9 Cir., 174 F. 2d 676, 690;

Kunimori Ohara v. Berkshire, 1935, 9 Cir., 76 F. 2d 204;

Singh v. Director, 1938, 9 Cir., 96 F. 2d 969, 971;

Ex Parte Shigenari Mayemura, 1931, 9 Cir., 53 F. 2d 621.

This rule is followed by the Supreme Court, N. L. R. B. v. Donnelly Co., 1947, 330 U. S. 219, and the other circuits. Rhodes Pharmacal Co. v. F. T. C., 1953, 7 Cir., 208 F. 2d 382, 387; Tassari v. Schmucker, 1931, 4 Cir., 53 F. 2d 570, 572; Murdock v. Clark, 1931, 1 Cir., 53 F. 2d 155, 156; Hayes v. Hatges, 1938, 8 Cir., 94 F. 2d 67, 68. Under this rule both opinion and hearsay evidence have been deemed admissible. In *Ex Parte* Seisuke Fukumoto, 1931, 9 Cir., 53 F. 2d 618, certain immigration inspectors were permitted to state their opinions from viewing photographs that persons bearing different names were actually one and the same alien.

In United States v. Wallis, 1922, 2 Cir., 279 F. 401, the court said at page 403: "Since the only legal limitation upon departmental procedure is that a hearing, fair though summary must be accorded *hearsay evidence is admissible.*" [Emphasis added.] See also Morrell v. Baker, 1920, 2 Cir., 270 F. 577; United States v. Uhl, 1920, 2 Cir., 266 F. 34; and Christianson v. Zerbst, 1937, 10 Cir., 89 F. 2d 40. Furthermore, contrary to appellant's contention the mere fact that incompetent evidence was received and considered does not establish want of due process in the hearing such as would require a reversal

on that ground. Tisi v. Tod, 1924, 264 U. S. 131; Vajtauer v. Comm'r of Immigration, 1927, 273 U. S. 103; and *Ex Parte* Jurgans, 1927, 17 F. 2d 507. See, also, United States v. O'Rourke, 1954, 8 Cir., 211 F. 2d 609, and the collection of authority contained therein at page 611.

The Substantiality of the Evidence

It is next urged by appellant that the deportation order cannot stand as it is not based upon reasonable substantial and probative evidence as required by the Act.[6] (Rubinstein v. Brownell, 1953, C. A., D. C., 206 F. 2d 449, affirmed by a divided court, 98 L. Ed. 234.) The argument is that of the four depositions taken in Honolulu, two were disregarded by the immigration authorities in arriving at their decision. Hence the order to deport Hyun is based solely upon the testimony of Uesugi and Izuka, there being no other evidence to sustain the substantive charge of membership in the Communist Party of the United States. Appellant then attacks the testimony of these witnesses on the basis of non-responsive and voluntary answers and general understandability. The testimony of Uesugi was characterized at one point as being given "with vagueness approaching unintelligibility," while Izuka was labeled a wholly incompetent witness and his testimony such as to corrupt and debase the entire proceeding. As a conclusion, appellant states that this hearing was in effect an *ex parte* hearing in his absence.

We have read and studied the depositions as a whole, and we are unable to agree with appellant's contentions.

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[6] 8 U.S.C.A. §1252(b)(4), June 27, 1952, c. 477, Title II, ch. 5, §242, 66 Stat. 208.

Both Uesugi and Izuka testified that they had joined the Communist Part in Honolulu and had come in contact with appellant at Communist meetings, as members. This has not been denied by appellant. Both this court and the Supreme Court of the United States have held that an inference may be drawn from the refusal of an alien to testify on his own behalf in deportation proceedings. Bilokumsky v. Tod, 1923, 263 U. S. 149, 153. And see Vajtauer v. Comm'r of Immigration, 1927, 273 U. S. 103, and Kunimoro Ohara v. Berkshire, 1935, 9 Cir., 76 F. 2d 204; Chan nom. Gee v. United States, 1932, 9 Cir., 57 F. 2d 646, 650.

The Constitutional Question

At the time the briefs in the instant case were written, the Supreme Court had recently decided in Galvan v. Press, 1954, 347 U. S. 522, that the statute attacked here[7] was constitutional and that it did not deprive aliens of due process of law by dispensing with proof of the character of the Communist Party in deportation proceedings. Also considered and decided negatively was the question of whether support or demonstrated knowledge of the Communist Party's advocacy of violence was intended to be a prerequisite to deportation. Subsequently the court granted certiorari in Garcia v. Landon, No. 279 Misc., ... U. S. ....., 74 S. Ct. (Adv. Ops.) 873, a case in which the constitutionality of deportation under the instant statute was upheld upon authority of the Galvan case. As a result, a petition was filed seeking a rehearing in Galvan v. Press. Both the Garcia appeal and the Galvan petition for rehearing were pending at the time the briefs in the instant case were filed. Appellant treated the decision in Galvan as not yet final and argued at length the constitu-

tional questions which were treated therein. Thereafter and during the October, 1954, term of court, Garcia was dismissed as moot and the petition for rehearing in Galvan was denied. Galvan thus becomes final, and the holding that the Internal Security Act of 1950 is constitutional is controlling in the instant case. The Supreme Court in commenting on the action of Congress in making present or prior membership of an alien in the Communist Party in and of itself ground for deportation, stated at page 529 (347 U. S. 522), "Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."

The judgment of the district court is affirmed.

(Endorsed.) Opinion. Filed Jan. 31, 1955.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX "B."

U. S. Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

File Numbers
1600-61258 and
A 3 611 569

Apr. 24, 1951

Decision of the Hearing Officer
In Re
David Hyun
in Deportation Proceedings

Charges

Warrant: The Act of October 16, 1918, as amended, in that he has been after entry a member of the following class set forth in Section 1(2)(C) of said Act: An alien who was a member of the Communist Party of the United States.

Lodged: None.

I. Discussion of the Evidence—Deportability

The respondent testified that he was born on January 3, 1917, in Seoul, Korea, and is in possession of a passport which shows him to be a citizen of China. This passport shows his birthplace as Kirin, Manchuria, and was issued at the Chinese Consulate General at Honolulu, T. H. on August 21, 1947. The respondent was admitted into the United States for permanent residence at Honolulu, Territory of Hawaii, on May 26, 1924, and at that time the record shows him to have been a citizen of China and gives his place of birth as Seoul, Korea. He resided continuously in the Hawaiian Islands until he came to the

mainland of the United States when he was landed at Los Angeles, California, on September 1, 1947.

When questioned as to membership in the Communist Party of the United States the respondent declined to answer the questions on the ground that such answers might tend to incriminate him, claiming the privilege under the Fifth Amendment to the Constitution of the United States and further claimed the privilege of remaining mute or declining to answer on the ground that it violated his rights under the First Amendment to the Constitution of the United States.

Depositions in this case were taken at Honolulu, T. H. on December 18, 1950, from four persons. Counsel was notified of the date and place the depositions were to be taken and was advised that the respondent could be represented by counsel at those proceedings. The respondent was not represented by counsel when the depositions were taken.

Of the depositions taken from the four persons, only the depositions of two of those persons are pertinent and relevant to the issue in this case. They are the depositions of Donald T. Uesugi and Ichiro Izuka.

The deponent, Donald T. Uesugi, was born on November 28, 1915, in Hanamalu, Kauai, in the Territory of Hawaii and has lived in the Territory of Hawaii all of his life. This deponent joined the Communist Party in the latter part of 1945 or the early part of 1946 and remained a member of that organization until the latter part of 1948. This deponent stated that he belonged to the Makiki cell of the Communist Party in Honolulu, and later belonged to the Punchbowl cell. While a member

of the Makiki cell he was the treasurer of that group and collected the dues.

This witness identified the respondent as David Hyun from the photograph as it appears on the Chinese passport of David Hyun and stated that he became acquainted with David Hyun about 1945 in connection with deponent's membership in the Communist Party.

The deponent Uesugi testified that he had attended meetings, closed meetings of the Communist Party, at the home of one Charlie Fujimoto on Kaia Street in Honolulu and that David Hyun attended some of these meetings. He had seen David Hyun attending meetings of the Makiki cell of the Communist Party on two or three occasions and again had seen him attending meetings of the Punchbowl cell about two or three times. This witness is somewhat indefinite as to the activities of the Communist Party but he is definite as to his own membership in the Communist Party and that the meetings of the Communist Party where he saw David Hyun were meetings that were closed to persons who were not members of the Communist Party and that David Hyun took part in these meetings as a member of the Communist Party.

The next deponent, Ichiro Izuka, was born on June 5, 1911, at Hanapepe, Kauai, and has resided in the Hawaiian Islands all of his life except for a brief period of residence on the mainland.

The deponent Izuka testified that he resided in Honolulu, Territory of Hawaii, from 1942 until 1947, and that he was a member of the Communist Party from 1938 until it disbanded about 1941, then he rejoined the Communist Party when it was reactivated in 1945, and resigned from the Communist Party in October of 1946.

This deponent was educated into the characteristics of the Communist Party not only in Hawaii but attended a training school of Communist Party members at 121 Haight Street in San Francisco, California.

This deponent identified David Hyun, the respondent, as a person that he had known as a member of the Communist Party and describes the set-up in Honolulu of the Communist Party at that time during 1945 and 1946. He states that during that time he definitely knew that David Hyun belonged to the Kaimuki Branch of the Communist Party and later at an executive board meeting of the Communist Party in the Territory of Hawaii he met David Hyun at one board meeting when David Hyun was representing the Punchbowl group of the Communist Party. Further, this witness places David Hyun as a representative of the Communist Party at at least three executive board meetings of the Communist Party where no persons other than members of the Communist Party were allowed to attend. This witness was also acquainted with David Hyun outside of the Communist Party as well as knowing him as a member of the Communist Party and a delegate representing the Punchbowl group of the Comunist Party at the executive meetings of the Communist Party. The witness is definite in his knowledge, and the testimony of the witnesses Uesugi and Izuka have not been controverted. Accordingly it must be found that the charge contained in the warrant of arrest is sustained.

II. Findings of Fact—Deportability

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native of Korea and a citizen of China;

(2) That the respondent entered the United States at Honolulu, Territory of Hawaii, on May 26, 1924, and was admitted for permanent residence;

(3) That the respondent was a member of the Communist Party of the United States in Honolulu, Territory of Hawaii, during 1945 and 1946.

III. Conclusion of Law—Deportability

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under the Act of October 16, 1918, as amended, and Section 19 of the Immigration Act of 1917, the respondent is subject to deportation on the ground that he has been after entry a member of the following class set forth in Section 1(2)(C) of said Act of October 16, 1918, as amended: An alien who was a member of the Communist Party of the United States.

IV. Other Factors

The parents of the respondent are living in the United States and have been admitted to the United States for permanent residence. No other information was developed as to the family of the respondent. There are no other factors than have been previously discussed.

V. Recommended Order

It is recommended that the alien be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

s/ JOHN B. BARTOS
John B. Bartos, *Hearing Officer*

Los Angeles, California

APPENDIX "C."

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A-3611569-Los Angeles (1600-61258) Appeal 15

In re: David Hyun

IN DEPORTATION PROCEEDINGS Aug. 1, 1951

In Behalf of Respondent: Milton S. Tyre, Esquire, 650 South Grand Ave., Los Angeles 14, California.

Charges:

Warrant: Act of October 16, 1918, as amended—After entry, alien who was member of the Communist Party of the United States.

Lodged: None.

Application: Termination of proceedings

Detention Status: Released under $5000 bond

Discussion: Upon consideration of the entire record, including the exceptions taken, the recommended order of the officer conducting the hearing is hereby adopted.

Counsel for respondent has submitted a bill of exceptions. Therein he takes exception to the finding of fact that respondent was a member of the Communist Party of the United States, and to the conclusion of law that respondent is deportable under the Act of October 16, 1918, as amended.

The deportability of respondent stems from these provisions of the Act of October 16, 1918, as amended by Section 22 of the Internal Security Act of 1950 (Public Law 831—81st Congress; Chapter 1024—2nd Session; H. R. 9490):

"Sec. 4(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in . . . section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry, into the United States."

Section 1(2) of said Act reads, in pertinent part:

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes: . . . (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . ."

Thus, the Act of October 16, 1918, as amended, *inter alia,* subjects to deportation any alien who was, at any time after his entry into this country, a member of the Communist Party of the United States.

The record in this case establishes that respondent is an alien, who entered the United States on May 26, 1924, and that he was a member of the Communist Party of the United States in 1945 and 1946. The foregoing facts render respondent deportable under the Act of October 16, 1918, as amended.

Counsel questions the constitutionality of the Act of October 16, 1918, as amended, and the Act of February 5, 1917, as amended. Determination of the constitutionality of a statute enacted by the Congress is beyond the reach of this Service. That is a function restricted to the

judicial branch of the government. Panitz v. District of Columbia, 112 F. (2d) 29, 42 (C. A. D. C., 1940). Todd v. Securities and Exchange Commission, 137 F. (2d) 475, 478 (C. A. 6, 1943).

It is contended by counsel that respondent's constitutional rights were violated, in that these proceedings were held while respondent was kept in custody of this Service. The record discloses that these proceedings were held over a period extending from November 22, 1950 to April 19, 1951. We find that respondent was afforded ample opportunity to prepare a defense to the charge placed against him by the government.

It is further contended by counsel that the hearing officer was biased and prejudiced. Counsel points to the fact that the hearing officer, being in the employ of this Service, was subject to its direction, instruction, and control, and therefore unable to render an unbiased and impartial decision.

In one respect, a federal judge and a hearing officer stand on the same footing,—both are, and have been, in the employ of the federal government. It would be an absurdity to disqualify a federal judge from presiding at a proceeding solely because that proceeding had been instituted by the federal government. The hearing officer is in an analogous position.

The conduct of the hearing officer is bound by the provisions of 8 C. F. R. 151.2(b), effective September 14, 1950 (published 15 F. R. 6169, September 14, 1950), which states, in part:

> "(b) *Hearing officer; general duties.* The hearing officer shall conduct a fair and impartial hearing. He shall use his independent judgment in rendering his

decision and shall not perform any duties inconsistent with the duties and responsibilities of an adjudicating officer . . ."

In the instant case, there is no evidence that the hearing officer consulted any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; or that the hearing officer engages in the performance of investigative or prosecuting functions; or that the hearing officer is responsible to or subject to the supervision or direction of any officer or employee of this Service engaged in the performance of investigative or prosecuting functions. Further, there is no evidence of personal bias or prejudice on the part of the hearing officer in favor of the Government or against respondent. Accordingly, we find that it was proper and legal for the hearing officer to have presided at these proceedings.

Counsel next protests that the hearing officer permitted depositions to be taken in Hawaii, without providing transportation to that place for the respondent or counsel. The law requires no such provision.

Objection is also made to the admissibility in evidence of the contents of these depositions. We have carefully examined the contents of the depositions in question, and we find that deponents Uesugi and Izuka testified that they had seen respondent in attendance at meetings restricted to members of the Communist Party of the United States. According to their testimony, these meetings occurred during 1945 and 1946. We find that this evidence is substantial and reliable, and that it fully sustains an order of deportation. When respondent was asked during these proceedings whether he was a member of the Communist Party of the United States, he replied that he refused to

answer that question on the ground that it might tend to incriminate him.

Counsel takes exception to the refusal of the hearing officer to grant motion of counsel to reopen the hearing for the purpose of introducing evidence concerning the nature of the Communist Party of the United States. The nature of said Party is not in issue in these proceedings and we find that the hearing officer properly denied this motion.

Order: It is ordered that the alien be deported from the United States, pursuant to law, on the charge stated in the warrant of arrest.

s/ A. C. DEVANEY
Assistant Commissioner, Adjudications Divisions

AG:cam
AG J.P.S.

APPENDIX "D."

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

Dec. 1—1952

File: A-3611569-Los Angeles (1600/61258)

In re: David Hyun

IN DEPORTATION PROCEEDINGS

In Behalf of Respondent: Blanche Friedman, Esq., 220 Broadway, New York, N. Y., and Richard W. Petherbridge, Esq., 257 South Spring Street, Los Angeles, California, and Isidore Englander, Esq. (heard March 12, 1952), 205 East 42nd Street, New York, N. Y.

Charges:

Warrant: Act of October 16, 1918, as amended—After entry alien who was member of Communist Party of United States

Application: That appeal be sustained; or that the proceedings be reopened

Detention Status: Released under bond

This is an appeal from the decision of the Assistant Commissioner on August 1, 1951, finding this respondent deportable on the charge in the warrant of arrest and directing that he be deported pursuant to law.

In oral argument and in brief submitted by counsel, all of the constitutional questions relating to due process, violation of the First Amendment, Bill of Rights and Attainder, and unfair and impartial hearing have been argued. In addition thereto, counsel contends that the Act of October 16, 1918, as amended in 1940, is unconstitu-

tional insofar as it is applicable to this respondent. Counsel specifically requests that the case be reopened for rehearing to incorporate the testimony of witnesses to supplement the evidence alleged to have been taken in the form of depositions or sworn statements from persons in the Territory of Hawaii, with no opportunity for the alien to cross-examine such deponents.

Counsel believes that there is insufficient relevant and material evidence to support the ground for deportation.

This respondent is a 34-year old male, native of Korea, citizen of China, who was admitted to the Territory of Hawaii at Honolulu on May 26, 1924 for permanent residence. He came to continental United States on September 1, 1947, and has resided in this country to the present time. Warrant of arrest was served in this proceeding on October 31, 1950 and hearing began on November 22, 1950, and was concluded April 19, 1951 in California.

The Hearing Officer has summarized the evidence in this case and it is unnecessary to repeat the facts here. He has found that the uncontroverted testimony of two witnesses establishes that this alien was a member of the Communist Party of the United States in Honolulu, Territory of Hawaii, during 1945 and 1946; and that during such period he attended Communist party meetings as a representative and as a delegate.

The Assistant Commissioner has carefully reviewed the case and in his memorandum and decision of August 1, 1951 has answered many of the pertinent questions raised by counsel. He has found that the evidence which shows that this respondent was a member of the Communist Party of the United States during 1945 and 1946 is substantial and reliable and fully sustains the ground for

deportation. The respondent has, on advice of counsel, refused to state whether he was a member of the Communist Party of the United States after his entry to this country.

We have carefully reviewed the pertinent evidence in this case and we find that there is substantial and reliable evidence which has been uncontroverted and which shows that this respondent was a member of the Communist Party of the United States during 1945 and 1946. We further find that he was an active member of such Party and that his membership in the Communist Party was voluntary.

Concerning the constitutional questions urged by counsel, it is noted that on March 19, 1952, the Supreme Court of the United States, in the case of Harisiades v. Shaughnessy, 342 U. S. 580 (72 S. Ct. 512), held that the United States may constitutionally deport a legally resident alien because of membership in the Communist Party of the United States. Furthermore, in an expressed opinion in Martinez v. Neelly, 197 F. 2d 462 (C. C. A. 7, 1952), the Court stated that membership in the Communist Party, present or past, is as a matter of law ground for deportation.

Concerning the request of counsel for rehearing in the case to receive testimony of witnesses to supplement the evidence in the nature of depositions or sworn statements taken about December 18, 1950 in Honolulu, Hawaii, in order that counsel may cross-examine such witnesses, it is noted that appropriate notice was given to counsel for the respondent on December 7, 1950, apprizing him that such statements or depositions would be taken and giving the respondent an opportunity to be present in person or through counsel and cross-examine the deponent. It ap-

pears that an appearance was waived by counsel for the alien (Ex. 5). Counsel now contends that the alien is not financially able to send a representative to Honolulu to appear for him, and was not able to do so in November or December of 1950. There is no provision of law or regulations which requires that the United States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the State of California and depositions were taken in Hawaii.

In view of the foregoing discussion it must be concluded that counsel's points of argument are without merit; that the record clearly sustains the ground for deportation; and that the appeal should be dismissed.

Order: It is ordered that the appeal from the decision of the Assistant Commissioner on August 1, 1951 be and the same is hereby dismissed.

s/ THOS. G. FENNIMONE (?)
Chairman

APPENDIX "E."

In the District Court of the United States, Southern District of California, Central Division. No. 15743-HW.

David Hyun, Petitioner, vs. Herman R. Landon, District Director, Immigation and Naturalization Service, Respondent.

Memorandum Opinion

An order to show cause why the petitioner should not be released from custody having heretofore been issued and the matter having been submitted for decision; it appearing to the court that there is sufficient evidence to support the warrant of deportation as disclosed from the records of the Immigration and Naturalization Service; the entire record having been submitted to the court for review and the court having reviewed said record;

It Is Hereby Ordered that the order to show cause heretofore issued be and is hereby dismissed, and

It Is Further Ordered that the petition for the issuance of a writ of habeas corpus be and is hereby denied, and

It Is Further Ordered that the custody of Petitioner be not disturbed in accordance with the rulings of the Circuit Court in the Carlisle matter, under opinion dated June 26, 1953. I view the [75] ruling of this circuit as binding upon this court until the Supreme Court rules to the contrary. I recognize Mr. Justice Douglas has made a different ruling in the Carlisle case but I do not feel that I am bound to accept as a precedent the ruling of an individual member of the Supreme Court.

Besides, I feel that the Carlisle case presents a different picture entirely from the case at bar. In this matter the Immigration and Naturalization Service was actually in

the process of deporting the petitioner under a warrant of deportation at the time of the filing of the writ after a full hearing and review by the Board of Immigration Appeals.

If the petitioner is to be granted his liberty while the matter grinds its way through the usual and laborious processes of the reviewing courts, the results will make a mockery of the government's attempt to exclude aliens that Congress has held to be undesirable.

Dated: This 21st day of August, 1953.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed August 21, 1953.

Docketed and entered August 21, 1953. [76]

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 201

DAVID HYUN, PETITIONER

v.

HERMAN R. LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A; R. 46) is reported at 219 F.2d 404.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1955 (R. 54). Rehearing was denied on April 7, 1955 (R. 55). The petition for a writ of certiorari was filed on July 1, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in the circumstances of this case it was an abridgment of procedural due process to admit into evidence, in a deportation proceeding in Los Angeles, testimony of witnesses taken by deposition in Honolulu.

STATEMENT

This habeas corpus proceeding arose as a challenge to a deportation order (Pet. App. B & C), based on membership in the Communist Party, which was affirmed by the Board of Immigration Appeals (Pet. App. D). The District Court for the Southern District of California denied the petition for the writ (Pet. App. E) and its action was affirmed on appeal (Pet. App. A).

Petitioner, a native of Korea, was admitted to the United States at Honolulu, Territory of Hawaii, on May 26, 1924 (R. App. 86).[1] He was admitted to the continental United States at Los Angeles, California, on September 1, 1947 (R. App. 84). A warrant for his arrest in deportation proceedings, issued October 31, 1950, charged him with being an alien, who, after entry, had been a member of the Communist Party of the United States (R. App. 262).

At the first hearing on November 22, 1950 (R. App. 69-96), the hearing officer questioned the alien carefully as to whether he understood the nature

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[1] "R. App." refers to the Appendix filed by the petitioner which contains the proceedings before the immigration authorities.

of the charge against him (R. App. 72, 74). Petitioner was called as a witness but declined to answer any personal history questions or to state whether he had ever been a member of the Communist Party on the grounds that he might incriminate himself (R. App. 80-88). He also refused on the grounds that his counsel had not had time to prepare his case, even though, as noted by the hearing officer, his counsel had first entered an appearance in this proceeding on August 9, 1949 (R. App. 77).

The government then entered a motion to take depositions in Honolulu (R. App. 89). Before ruling on the motion, the hearing officer offered petitioner's counsel an opportunity to go into any matter having a bearing on the issue in the case (R. App. 89), to present witnesses, and to develop any evidence he so desired (R. App. 90). Petitioner's counsel insisted he was not prepared and wanted a continuance, and that the entire proceedings were in violation of law, in that the warrant of arrest was improperly served (R. App. 90). The motion to take the depositions was then granted (R. App. 93). The hearing officer informed petitioner that he would be notified of the date and time witnesses would appear at the office of the Immigration and Naturalization Service in Honolulu (R. App. 93). He also told petitioner that he could be represented there by counsel, present witnesses, and submit interrogatories to be propounded to the witnesses (R. App. 93). Petitioner's counsel objected to the ruling as arbitrary and unfair and stated that he did

not see why the depositions could not be taken in Los Angeles or why petitioner or his counsel or both should not be present in Honolulu at the government's expense (R. App. 94). Counsel made no mention of any financial inability on petitioner's part to attend or be represented in Honolulu. He did not allege that petitioner wished to confront the witnesses personally.

The depositions were taken in Honolulu on December 18, 1950 (R. App. 268), with notice served to petitioner of the time and date. The record reveals this statement made by the examining officer at the time the depositions were taken (R. App. 268):

> And further I have been advised by attorney Symonds of the firm of Bouslog and Symonds that he has been in communication with Mr. Tyre and had originally intended to enter an appearance here. However, I have just been advised by Mr. Symonds that he does not desire to enter an appearance, nor does he desire to cross-examine the deponents today.

Mr. Tyre was petitioner's counsel at all the administrative hearings. Petitioner did not present any witnesses or interrogatories at Honolulu.

Two of the witnesses whose depositions were taken had been officers in the Communist Party in Hawaii during the time they stated they knew petitioner (R. App. 276, 306). They each testified that they saw him in attendance at several closed Communist meetings. The witness Izuka, who was

trained at a Communist training school in San Francisco (R. App. 302, 303) and was a Communist from 1938-1946, testified in detail as to the organization of the Communist Party in Hawaii (R. App. 303-304). Izuka specifically placed petitioner at three meetings of the executive board of the Communist Party in Hawaii (R. App. 291, 294, 295, 296), and recalled conversations he had had with him on Communist matters at two of the meetings (R. App. 296, 297). He recalled also a dispute within the Communist Party over the firing of a party worker in which petitioner engaged (R. App. 301). Izuka stated that he knew petitioner socially (R. App. 299, 300, 301) and as a member of the executive board of the Communist Party in Hawaii (R. App. 310).

The depositions were offered into evidence at the reopened hearing at Los Angeles on March 13, 1951 (R. App. 97). Although counsel for petitioner had had a copy of the depositions since January 1, 1951 (R. App. 104), the hearing officer granted a 15-day continuance (R. App. 102) in order that petitioner himself could see and study the depositions (R. App. 107). The hearing officer stated (R. App. 107):

> * * * this is Mr. Hyun's hearing and I am going to see that he gets a hearing and that he has every opportunity to comment on any of the evidence.

At the reopened hearing on March 28 and 29, 1951, petitioner's counsel objected generally to admission of the depositions into evidence because

counsel and petitioner had not been allowed expenses to Hawaii to confront the witnesses (R. App. 109, 110). Counsel for petitioner gave as his reason for not submitting any cross-interrogatories (R. App. 112):

> I mean that it was impractical for David Hyun to be represented in Honolulu by another lawyer to cross examine witnesses without the presence of Mr. Hyun to assist in such cross-examination, or at least without the presence of his own counsel, which I think in itself would have been inadequate.

The examining officer noted that petitioner could have been present under guard at his own expense but that he had not so requested (R. App. 114). Petitioner's counsel entered specific objections to certain answers and questions contained in the depositions, all of which were overruled (R. App. 115-217). Petitioner declined to answer questions as to Communist affiliations on the grounds that he might incriminate himself. On the same basis he declined to state whether he knew the government's witnesses (R. App. 230-233).

At the close of the government's case, a continuance was granted so that petitioner's counsel could ascertain what evidence he wished to present (R. App. 238). At the reopened hearing on April 19, 1951, petitioner offered no witnesses in his behalf, but did seek another continuance to find a witness to testify as to the character of the Communist Party (R. App. 250). This request was denied on

the ground that the character of the Communist Party was not in issue (R. 252).

The hearing officer found on the basis of the uncontroverted evidence in the depositions that petitioner had been a member of the Communist Party and recommended deportation (Pet. App. B, 11-15). This recommendation was adopted by an assistant commissioner of the Immigration and Naturalization Service (Pet. App. C, 16-20), and affirmed by the Board of Immigration Appeals (Pet. App. D, 21-24).

ARGUMENT

Arguing from the established principles that deportation proceedings must accord an alien due process and that normally a requisite of fairness is presence of the alien at the hearing, petitioner, who was present at each of the five hearings accorded him in Los Angeles, contends nevertheless that the use of deposition testimony deprived him of due process. In so doing, he confuses the right of confrontation with the right to be present at a hearing. In any civil case, testimony may be taken by deposition. Rule 26(d)(3), F. R. Civil P., allows the use of depositions upon due notice to the adverse party if the witness is at a greater distance than 100 miles from the place of hearing. Since deportation proceedings are civil in nature,[2] the use of deposition testimony in such hearings does not, in itself, violate due process. *Berkman* v. *Tilling-*

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[2] *Carlson* v. *Landon*, 342 U.S. 524, 537; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594.

hast, 58 F. 2d 621, 622 (C.A. 1); *Bhagat Singh* v. *McGrath*, 104 F. 2d 122, 123 (C.A. 9).

And there was nothing basically unfair in the use of deposition testimony in this particular case. Petitioner had the opportunity to protect his interests at the time of the taking of the depositions by employing counsel in Honolulu to represent him and was so informed by the hearing officer at the time the motion to take depositions was granted. He was given full opportunity to prepare cross interrogatories and present his own witness (R. App. 93). There is no showing (nor was there a claim in the administrative proceeding) that he was unable to employ counsel in Honolulu if he wished to do so; the indications are to the contrary (see Statement, *supra*, pp. 4, 6). Petitioner was also informed that, had he requested the right to attend the taking of the depositions in Honolulu, he could have done so under guard and at his own expense (R. App. 114). Although this was after the depositions had been taken, it was in time for him to be present at a cross-examination of the witnesses. And while such a proceeding would undoubtedly have been expensive, petitioner did not allege that he was financially [3] or physically unable to go to Honolulu.

In any event, there is no showing that the right to be represented by counsel, prepare cross-interrogatories, and present witnesses at the time of the

[3] Financial inability to attend the taking of depositions has been held not to be a denial of the right to cross-examination. *Bhagat Singh* v. *McGrath*, 104 F. 2d 122, 123 (C.A. 9).

depositions, would be, or was, inadequate to preserve petitioner's right to a fair hearing. There is no claim of mistaken identity on the part of the witnesses, and their testimony fully supported the administrative findings (see Statement, *supra*, pp. 4-5). Petitioner denied none of the testimony presented by the government although he testified after the government's evidence was concluded (R. App. 219-234). Cf. *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-5; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111-112. He presented no witnesses in his behalf. His one affirmative move was to seek another continuance, after being given a ten-day continuance to prepare his defense (R. App. 238), in order to find a witness who could testify as to the character of the Communist Party (R. App. 250), a motion properly denied by the hearing officer as not relevant (R. App. 252). This was the sum and substance of petitioner's defense to the charge of Communist Party membership as against the positive identification of petitioner in the government's evidence. On the whole record, it seems reasonable to infer that petitioner deliberately failed to participate in the depositions because he felt he had nothing to gain by so doing.

CONCLUSION

The decision below is correct and there is no conflict on the issue presented. We respectfully submit that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
ISABELLE R. CAPPELLO,
Attorneys.

AUGUST, 1955.

U. S. GOVERNMENT PRINTING OFFICE 1955

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IN THE

Supreme Court of the United States

October Term, 1955
No. 201

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY MEMORANDUM

So far as it treats of the deprivation of fair hearing at all, the Government appears to suggest largely that it is excuse enough for a bad and unconstitutional hearing that in its opinion in likelihood the petitioner was a "bad" individual and was in probability deportable on supposed (but never fairly tried) charges. The position is that the Constitutional rights of fair hearing exist only for those whose certainty of acquittal is so evident without trial as to make needless, or largely so, the safeguards of fair hearing established by the Constitution as a process for arriving within the law at the very judgment thus

extra-legally assumed. This totally inverts the Constitution and the rights of hearing and destroys due process of law. In the apt words of *United States v. Morgan* (2d Cir.), 222 F. 2d (Adv. Ops.) 673, 675, "Such reasoning would warrant punishment before trial. . . ."

The substance of the matter is that the Government has avoided the Constitutional issue because it has no valid answer. So shocking is the concept of tearing a man from his family and deporting and exiling him without even affording him the dignity of fairness of insured presence at his hearing that response by avoidance rather than reply is preferable.

The Government does attempt to excuse the denial of presence at bar by invoking the assertion that deportation proceedings are "civil" in character rather than criminal. From this the Government would urge, both being "civil", that deportation hearings need afford no greater rights of hearing than those required in a civil default for potatoes sold and delivered, and that in consequence presence no more than any other right of personal liberty is important in or need be observed in deportation proceedings save at government pleasure. But the Constitution is not thus circumvented by generalities or mere turn of words, and particularly not where liberty, not material rights, are issued. Due process of law there is not a matter merely of semantics.

It is the consequence not the form of the judgment which matters in fair hearing, and the short of the principle which governs is that where liberty is at stake society can not *afford* to be careless in hearing or disregardful of rights lest it undermine for all others the rights it fails to secure to any one.

Moreover, the principles of required fair hearing where liberty is at stake apply with particular force and inflexibility where a proposed disregard of protections is without compulsion of necessity and is proposed to serve government convenience only. The disregard of fair hearing below by denying security of presence was government action of *just such character*. Upon this feature of the case the government is silent utterly—because no response is better than any there to be availed of. It offends an inherent sense of fair play, recognizable by all, to permit arbitrary deprivation of fundamental rights, essential to the individual as safeguards of fair hearing, because only such serves the convenience or pleasure of government, or, if honored, might occasion expense incident only to securing a just hearing in proceedings not of the choice of the accused.

Not only does the Government Brief skirt and avoid the true issues of law in the cause at bar, but, as well, its statement of the Record is inaccurate in important respects. It is suggested, for example, that since petitioner "was present at each of the five hearings accorded him in Los Angeles" (Gov. Br. p. 7), his absence from the hearings in Hawaii is a minor thing, and that, in any event, he was represented even there indirectly or in substance by an "attorney Symonds of the firm of Bouslog and Symonds" (as implied at page 4 of the Gov. Br.).

The truth is that the Los Angeles hearings were formalities only, and the entirety of the substantive evidence against petitioner was admitted in Hawaii by deposition without his presence. Presence at the Los Angeles hearings was for all real intents and purposes only presence at the drawing and closing of the curtain; petitioner was excluded from the entire action of the play in between.

And as to the innuendo that petitioner was represented in any measure by "attorney Symonds of the firm of Bouslog and Symonds," the full answer, not quoted by the Government, is set forth in the Record at page 112 (S. R. 112) in the statement of petitioner's true counsel, uncontradicted, that:

> "I want to state clearly for the record at this time that at no time has any attorney in Honolulu or anywhere else ever had the authority either from David Hyun or from me to act as counsel for David Hyun in any part of this particular proceedings that is in deportation proceedings, whether at a deposition or any other hearing. Any statement contained in the Examining Officer's statements which may infer that Mr. Hyun was represented directly or indirectly at those depositions or it was contemplated that he would be represented at those depositions should be negated, as the fact is that he has never been represented nor has he sought representation in Honolulu. The reasons are as previously stated that it was impossible to cross examine witnesses 2500 miles away by another lawyer without the presence of David Hyun himself and/or his lawyer who has handled the proceedings up to that point. I just want to make the record clear on that."

The sole issue of the petition at bar is the minimal right of the accused to physical presence at his hearing in proceedings threatening liberty in most serious manner. Reduced to its essence the Government reply suggests only that any hearing is fair hearing enough for deportations because they are "civil" and that in any event since it believes in the case at bar after an unfair hearing that

petitioner is likely deportable, a fair hearing is not needed and would now be pointless. Neither response is any answer at all in law, reason, or under the Constitution. The Government's position, moreover, plainly foreshadows routine adoption of the practice followed here. Review by this court is thus called for not only by petitioner's just claim to due process protection but by the importance of the question in the administration of the deportation laws.

Conclusion.

It is respectfully submitted the petition for a writ of certiorari should be granted.

JOHN W. PORTER,
Attorney for Petitioner.

WILLIAM B. MURRISH,
HERBERT W. SIMMONS, JR.,
Of Counsel.

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17 Boston University Law Review (1937), Sterilization Laws; Their Constitutionality, pp. 246, 247-249 ..... 90, 91, 94
16 Columbia Law Review (1916), pp. 18-36, note 44
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Hughes, Eugenic Sterilization in the United States (1940), Supp. No. 162 to the Public Health Reports, U. S. Public Health Service 90, 91
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Los Angeles Times, August 8, 1955 102
Newsweek, June 9, 1952 102
New York Times, January 31, 1950 102
New York Times, June 5, 1952 102
New York Times, July 19, 1953 102
28 North Carolina Law Review (1950), pp. 205-215, note 42
Report of the Committee of the American Neuralogical Association for the Investigation of Eugenical Sterilization, Eugenical Sterilization (1936), Chap. II, pp. 7-21 ..... 90, 91
23 Temple Law Quarterly (1949), pp. 151-153, note 42
The London Times, April 21, 1954 102
12 Washington and Lee Law Review (1955), pp. 230-238, note 42, 44

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100 American Law Reports, pp. 478-487, anno. 41
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4 Barron & Holtzoff, Federal Practice and Procedure (Rules Ed., 1951), pp. 394-395..... 41
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1 Cooley, Constitutional Limitations (8th Ed.), pp. 662-667....
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44 Corpus Juris Secundum, p. 78 .....78, 86
11 Cyclopedia of Federal Procedure (3d Ed.), Sec. 39.79..... 41
11 Cyclopedia of Federal Procedure (3d Ed.), Sec. 43.01, note 3 41
2 Hale, Pleas of the Crown, pp. 300, 298..... 42
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2 Pollock and Maitland, A History of the English Law (2d Ed.) pp. 598-603..... 44

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Stephen, A Digest of the Law of Criminal Procedure (1883), Art. 302 46
1 Stephen, A History of the Criminal Law of England (1883), pp. 14, 23 100
1 Stephen, A History of the Criminal Law of England (1833), Chaps. VIII, IX, pp. 73, 244, 246, 254 ..... 44, 45
Wharton, Criminal Pleadings and Practice (9th Ed., 1889), p. 392 ..... 33, 41, 44
Whitman, Federal Criminal Procedure (1950), Sec. 43.3, p. 348 42
5 Wigmore on Evidence, p. 127 32
5 Wigmore on Evidence (3d Ed.), pp. 146 and 191 56

IN THE

Supreme Court of the United States

October Term, 1955

No. 201

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Court of Appeals [R. 45-53] is reported at 219 F. 2d 404. The opinion of the District Court [R. 37-38] is unreported. The opinions of the Hearing Officer of the Immigration and Naturalization Service [R. 94-98], of the Assistant Commissioner of the Immigration and Naturalization Service [R. 59-62] and of the Board of Immigration Appeals, United States Department of Justice [R. 56-58] are unreported.

Jurisdiction.

The judgment of the Court of Appeals was entered January 31, 1955. [R 53.] Rehearing was denied on April 7, 1955. [R. 53-54.] The petition for a writ of certiorari herein was filed July 1, 1955, and was granted October 10, 1955. [R. 54.] The jurisdiction of this Court rests upon 28 U. S. C., Section 1254(1).

Question Presented.

Whether in a deportation proceeding it violates due process of law, under the Fifth Amendment, and the constitutional requirements of fair hearing thereunder, to take evidence against the alien through "*ex parte* depositions" of witnesses in Hawaii, 2,500 miles from the place of hearing and of the alien's residence, Los Angeles, particularly in consideration that,

(a) the "*ex parte* depositions" constituted not merely a part but the *entirety* of the substantive evidence adduced on behalf of the government, and, being taken as described, without the presence or agreement of either the alien or his counsel, characterized the hearing as *total* trial *in absentia;*

(b) the deposition "testimony" was bottomed and founded upon "identification" of the affected alien *solely* on basis of a passport-photo and passport, issued to the name of the alien affected, and so showing *upon its face,* thereby compounding, and emphasizing, the injury of denial of right of confrontation;

(c) the deportation proceedings affect a lawfully-admitted, long-resident alien, married to a citizen

and father of citizen children, assimilated fully to American habits, language, culture and life, and where there was involved in deportation jeopardy not only to liberty, but to life, or of physical persecution;

(d) the procedure of foreign depositions taken away from the place of hearing was required by no consideration of necessity or compelling cause, but was undertaken, and avowedly, merely to serve government convenience and economy.

Constitutional Provision Involved.

The Constitutional provision involved is the due process of law provision of the Fifth Amendment to the United States Constitution reading, "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

Statement of the Case.

The crux of the case at bar is whether gravest process —affecting deeply liberty and even jeopardy of life—can be due process, with disregard—and *total*—of right of presence of the accused, without justification either in waiver or in necessity, and undertaken only to serve government economy and convenience.

The proceedings below were in Habeas Corpus to review constitutionality, including particularly challenge as to fair hearing and procedural due process of law, of a final order of deportation.

Involved in the proceedings were heaviest issues of personal liberty and jeopardy even to life.

David Hyun, petitioner here and below, was born in Seoul, Korea, January 3, 1917. [R. 203.]* When petitioner was a child but seven years old, his parents moved with him permanently to the United States, and petitioner, with his mother and father, entered the United States lawfully, and for permanent residence, at Honolulu, Hawaii, May 24, 1924. [Ex. 4; R. 112, 207.] Ever since that date petitioner has continuously resided in the territorial United States. [R. 207, 206.] On September 1, 1947, he, together with his parents, moved, lawfully to Los Angeles, California [R. 206], and since such date he has lawfully and continuously resided there. [R. 206.]

Petitioner is married, and the father of two minor children, sons, all citizens by birth of the United States [R. 4, 219], and is an architect by profession. [R. 4.]

October 31, 1950, petitioner was arrested in Los Angeles, where he was resident, by warrant of the Immigration and Naturalization Service. The warrant charged petitioner with being deportable under the Act of October 16, 1918, as amended, 1950, upon charge of "[having] been, after entry, a member of the following class set forth in . . . said Act: an Alien who was a member of the Communist Party of the United States." [R. 227, 228.]

Under the said warrant petitioner was taken into immediate custody, and he was thereafter continuously held in custody by the Service throughout the whole of

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*Exhibit 2, indicates birth in "Kirin, Manchuria". Petitioner testified he believed Seoul, Korea, was his true birthplace, but of his own knowledge he knows with absolute certainty, no birthland. [R. 203.]

the hearings affecting his deportability hereafter described. [R. 126, 130; Ex. 1.] During the whole of said period, petitioner was denied totally right of bail. [R. 130, 131; Ex. 1.]

Hearing was held in petitioner's cause in Los Angeles, California, commencing November 22, 1950. Petitioner was present there, although in custody-restraint. [R. 98, 126, 130.]

At the very opening of the said proceedings, and after only the introduction of brief documentary evidence affecting alienage only [R. 108-114], the Examining Officer, on behalf of the government, moved for leave to take the depositions *in Hawaii* of four named persons, Richard Kageyama, Easter Doyle, Donald Uesugi, and Ichiro Izuka. [R. 114.]

No cause or necessity was shown, or suggested, *then* or *ever,* for the proposal so to take "depositions"—in place of producing such witnesses at the place of hearing, to confront petitioner, and to testify in his presence—save for the statement by the Examining Officer that: "the persons mentioned are residents in the Territory of Hawaii, and for that reason the motion [is] made . . ." [R. 118.]

The motion was granted. [R. 117.]

Thereafter the "depositions" of such four persons, in Hawaii, *ex parte,* as is hereafter related, were conducted —without the presence of petitioner, or of any counsel representing him—and the said depositions, so conducted, constituted ultimately, as is hereafter related, the *sole* and *only* evidence offered or introduced by the government on the substantive issue of grounds of deportability.

The only evidence introduced in the presence of petitioner, at the Los Angeles proceedings, was documentary evidence relating only to the issue of alienage. Thus, though petitioner was granted supposed "hearing" in Los Angeles, California, and was brought in custody-restraint to be present there, in actuality the whole of the substantive evidence affecting his cause—and hence his "hearing"—was taken and received in proceedings conducted in Honolulu, Hawaii, without his presence. Indeed, at one point in the Los Angeles proceedings the Examining Officer inadvertently acknowledged as much, and was reprimanded for this breach of form.

> "*Hearing Officer:* Each of you gentlemen have referred to a hearing in Honolulu, in the Territory of Hawaii. There was no hearing in the case of David Hyun in the Territory of Hawaii. Depositions pertinent to the issues in this case were taken in the Territory of Hawaii and we have those depositions here to be considered in the hearing which is here, not in Honolulu.
>
> "*Examining Officer:* That's true. I erroneously referred to the taking of the depositions at the hearing.
>
> "*Hearing Officer:* It was not a hearing."
>
> —[R. 133].

As previously described, petitioner, at the time of the motion to take the Hawaiian depositions, was in confinement under custody of the Service. [R. 126, 130, 131.] At the time of the making and granting of the motion, and at the time of actual taking of the depositions, petitioner was not even advised he could, in any manner or

course, attend the depositions, but was advised instead, by the Hearing Officer, that:

> "Counsel will be given notice of the date those witnesses will appear . . . in Honolulu, T. H., and at that time, the respondent may be represented there by counsel, and may present witnesses, and counsel may submit interrogatories, which will be propounded if he so desires on the dates the named witnesses appear in Honolulu."
>
> —[R. 117-118].

Before the taking of the depositions, additionally, petitioner was given written notice in the following form only:

"Mr. David Hyun
c/o Immigration and Naturalization Service,
Detention Quarters,
Terminal Island,
San Pedro, California.

Dear Sir:

"Pursuant to the order of Hearing Officer John B. Bartos on November 22, 1950, in your case, depositions will be taken from the following-named persons on December 18th and 19th, 1950, at the Immigration Station, Honolulu, T. H.:

Richard C. Kageyama, Easter J. Doyle, Donald Uesugi, Ichiro Izuka

"Your counsel may appear personally or through associate counsel during the taking of these depositions, or you may submit interrogatories. If interrogatories are submitted they should arrive in this office not later than 9:00 A. M., December 18, 1950."

[R. 266-267].

This notice was delivered to petitioner in confinement. [R. 267, 126, 132-133.]

Before [R. 114-119] and after [R. 122-123, 129-133, 216-220] the motion for and the taking of the depositions [which were taken in Hawaii, December 18, 1950—R. 229 *et seq.*], counsel for petitioner objected to the proposed procedure as violating Constitutional procedural due process and denying the right of David Hyun to be present, and denying the right to confrontation of witnesses and to cross-examination, and the right to representation by, and consultation with, counsel, and repeatedly, and earnestly, requested either that the witnesses be produced at the hearing in Los Angeles, or that petitioner, counsel, or both, all alternatively, be transported to the place of the taking of the depositions to be present there. All of these requests and motions were denied. [R. 117, 119, 130, 132-133, 216, 220.]

Prior to the order granting the government request that the depositions be taken, and to the taking of such in fact in Hawaii without petitioner's presence, counsel was interrupted and not even permitted to fully state his objections to such proposed action. [R. 114-119.]

After the depositions were taken—without the presence of petitioner, or of counsel, as above stated—the same were produced in Los Angeles and offered in evidence in the Los Angeles proceedings, March 13, 1951. [R. 120.] On their offer, counsel stated the objections above-related to their admission, and requested that at least for purposes of cross-examination provision be made for right of David Hyun to be present at a hearing with presence of the witnesses, for right of confrontation and cross-examination and for effective right of counsel, with right of consultation. [R. 122-123, 129-133, 216-220.] These were denied. [R. 130, 132-133, 216, 220.]

When the depositions were offered in evidence in Los Angeles, March, 1951, as above described, the Examining Officer, without prior indication of such suggestion, declared, *after the fact,* that David Hyun could have been present, *personally,* as well as with or by counsel, if willing to pay for the expenses of transporting himself, and guards to secure him, had he so requested and offered. Witness:

> "*Examining Officer:* I think the record should . . . reflect that if Mr. Hyun had desired he could have been there in person too if he could have made the financial arrangements.
>
> "*Counsel:* Mr. Hyun was in custody at that time.
>
> "*Examining Officer:* That's right, he was in custody but there was no request on his part at any time after he received the notice of the fact that depositions were to be taken that he could be present at the hearing and if he had so indicated arrangements would have been made by the government to have him brought to Honolulu under proper safeguards."
>
> —[R. 132-133].

And, subsequently:

> "*Examining Officer:* The government does not feel under any obligation to transport witnesses at great expense over thousands of miles. The taking of depositions is a recognized and accepted and acknowledged form of taking testimony under such conditions.
>
> "At the time the depositions were taken in Honolulu counsel and respondent were notified as to the date the depositions would be taken. They could have been present if they so desired, and even though Mr. Hyun is in custody if he had indicated a willingness to be present arrangements would have been made to have him go to Honolulu under proper escort.

However, that would have had to be under his own expense if he wanted to be present. That was up to him and that was up to counsel. They did not see fit to avail themselves of that and counsel in the alternative was given an opportunity to prepare cross-interrogatories. He too declined to do this."

—[R. 217].

After the admission of the depositions, counsel, in urging the objections and motions above related seeking right of David Hyun to be rendered present before the witnesses at least for cross-examination, stressed and declared the indispensable importance of fair trial, and of due process, in a deportation proceeding as serious as at bar, stating in part:

"*Counsel:* . . . I want to point out to the Hearing Officer that this is not a question of one party suing another party for some money or a judgment or for damages; it isn't just an ordinary criminal action where a man might be penalized by some monetary sum or even by jail for six months or a year. This is a deportation matter and . . . even though it is not technically considered a criminal matter [a deportation matter], can be far more onerous, and it is in this case . . . because in this case David Hyun has been living within . . . the boundaries of the United States since he was seven years old and he is 34 today—27 years within the United States . . . It . . . seems to me when there is as much at stake [including right] to remain with his wife and two children [the matter], is an important issue. This is far more important than an ordinary simple criminal matter or the most serious civil matter, and it . . . seems to me that we don't ask very much of the Department of Justice to spend a few hundred dollars to transport David

Hyun to Honolulu so he can be there . . . so that he may be present to cross-examine witnesses. . . . [It] is a right of . . . a defendant . . . to confront the witnesses against him. It has been classically and is now considered . . . one of the fundamental necessities to a fair hearing in the terms of what we call due process. Here are three witnesses testifying against David Hyun to matters which if they were believed and if they are properly in evidence and so on, could deport this man from his own home and after 27 years, and they are not required to look at David Hyun, to watch him, to have to face him, while they make these alleged statements. * * *

"I really want to urge this sincerely upon you, Mr. Bartos, that if necessary recess be called that this matter may be considered. The motion which is now before you is the motion I made before, namely to have Mr. Hyun transported to Honolulu that he may be present at the cross-examination of these three witnesses, or in lieu of that, that they be brought here so that we may cross-examine them in Los Angeles with Mr. Hyun present or in lieu of that that the depositions be stricken and all the testimony of these witnesses taken in Honolulu be stricken from the record."

—[R. 218-220].

The Hearing Officer ruled the depositions were entirely proper without requirement of presence, because in deportation there was no duty in any manner to produce witnesses for personal presence at a hearing, nor duty to transport counsel or accused to the place of hearing of witnesses by depositions. Said the Hearing Officer:

"In deportation proceedings the government does not have the burden of sending the respondent or

his counsel to the place where depositions are taken. Therefore, your objection on that ground is overruled. * * * As to the matter of the detention of the respondent that is not within my province to release him or detain him . . . The Attorney General ordered him detained."

—[R. 130-131].

Counsel urged that in other deportation proceedings in comparable premises, witnesses had been transported to the place of hearing, for confrontation, and counsel referred to examples of such action affecting testimony by one Paul Crouch. [R. 216-8.] The Hearing Officer commented, in reply:

"*Hearing Officer:* I will answer it. . . . I will state for the record that witnesses have been brought from various places to testify in deportation hearings. However, the motion was made that depositions be taken in this case in Honolulu. That motion was granted. Counsel was notified of the date, place and time that they were to be taken and notified that the respondent could be represented by counsel at that time. He was not represented. * * * The motions of counsel are denied."

—[R. 218-220].

As previously stated, the depositions were taken December 18, 1950, in Honolulu, Hawaii, and at their taking petitioner was not present nor was he represented by any person or counsel. The depositions were taken *ex parte*, by an examining officer and a hearing officer, and these [R. 229] not even the officers charged with conducting the proceedings in Los Angeles. [R. 98.]

Of the four deposition witnesses, the first, Richard Kageyama, refused to testify as to any subject beyond

identifying himself, invoking the privilege of the Fifth Amendment. [R. 232-233.] His testimony, therefore, was disallowed. [R. 95.]

The remaining three deposition witnesses were examined by an examining officer, without objections from any source, and, of course, without cross-examination, and without, as well, restraint or discipline of any manner undertaken by the acting Hearing Officer. [R. 229-266.] The examination was characterized in its entirety by grossest impropriety in questioning, and by questions crudely, even abusively, leading and suggestive in form and in import, and including open, unashamed invitations to the witnesses to express, or hazard, conclusions, opinions, and even "guesses." [R. 233-266, and, especially, as illustrative, R. 234-235, 236-239, 246, 249-252, 261-266.]

Despite the character of the examination, the "testimony" of Easter Doyle reached no probative matter. [R. 259-266.] He averred, simply, that he considered discussions of the subject of communism "dry" [R. 262], and that David Hyun had "not directly" talked to him of such subject [R. 261], and that he did not "know directly whether he was one [Communist Party member] or not, but my belief [was] that he was one" [R. 262]; that he had "No reason at all," to doubt he was a member. [R. 263.] The Hearing Officer disallowed the testimony of Doyle in its entirety as being lacking in probative value or significance. [R. 95.]

Only two of the depositions—those of Uesugi and Izuka—were ultimately accepted as of evidentiary consequence. These, only, were made the testimonial basis of the Hearing Officer's decision. Said the Hearing Officer:

> "Of the depositions taken from the four persons [in Hawaii] only the depositions of two of those persons are pertinent and relevant to the issues in this case. They are the depositions of Donald P. Uesugi and Ichiro Izuka."
>
> —[R. 94-95].

In their depositions [R. 233-241 and 241-259], Uesugi and Izuka "testified" to alleged membership in the Communist Party by petitioner (in Hawaii between 1946 and 1947-1948) in only the most conclusionary manner, without evidentiary foundation and in response to most grossly leading and "educative" questions, and, moreover, connected and related in *every* instance with no activity save the most lawful, and constitutionally protected, acts of speech and expression of opinion.

Importantly, both Uesugi and Izuka, as with the witness, Easter Doyle, "identified" petitioner as the subject of their testimony *only* by being shown and asked to examine *Exhibit 2*—a Chinese passport-photo and passport, issued to "David Hyun" and *plainly so showing upon its face.* [R. 228; Ex. 2; and see R. 234 and 244-245; *cf.* R. 108-109.]

Uesugi [R. 233-241], after "identifying" [R. 234] petitioner *only* in the manner above stated, "testified" that petitioner was "as far as I am concerned I think he is a Communist Party member" [R. 234], because seen by him at from four to six meetings of people "I think they are communists" [R. 238], meetings characterized by discussion "something like concerning labor movements" [R. 237], and which "were educational meetings, sometimes social" [R. 235], concluded by the witness to be "closed" meetings because "they closed the doors." [R. 238.]

Petitioner was conceived by Uesugi to be a Communist Party member because "I have no reason for believing that he was not a communist" [R. 239], and "because it is a meeting and nobody else would be in it." [R. 239.]

Izuka, in his deposition [R. 241-259], similarly "identified" petitioner from the passport-photo and passport embodied in Exhibit 2, in the manner and premises above stated [R. 244-245], and on such basis declared a person thus identified by him attended not more than three meetings believed and understood by him to be "closed" meetings of the "executive board" of the Communist Party in Hawaii. The subject matter discussed at these meetings were improvement of the "morale" of the longshoremen's union in Hawaii [R. 246], the question of the morale of striking sugar workers at certain plantations [R. 248], and discussion of Republican and Democratic candidates for Territorial election of representatives to the United States Congress. [R. 248-249.] Izuka never personally heard the person identified by him discuss "his party membership" [R. 250], and, although he talked to him—on "very few occasions" [R. 250]—never heard him discuss "any party business" [R. 250], a fact explained by him: "I think it was known to Communist Party members that we shouldn't discuss party matters in such social gatherings." [R. 250.] He also "testified" one Carol Abe in a certain incident was discharged from employment as an office worker, ". . . and David Hyun was, I believe, in official capacity representing the office workers union. And he took the matter up with Jack Hall, and Jack Hall and Dave Thompson discharged Carol Abe as office clerk." [R. 251.] This incident he described as "Well, within the Communist Party of discharging another party member from an office job." [R. 251.] Re-

specting the meetings of the "Executive Board," above described, Izuka testified he "saw David Hyun [there] representing the Punch Bowl group." [R. 245.] He also testified he himself attended these three "Executive Board" meetings, though he was not a member of the said Board, on the basis of invitation extended to him because of his interest in the subject of discussion—issues relating to union and election subjects. [R. 245-249.] He further testified, in other connections, as previously stated, that "David Hyun" was a representative of the "Office Workers Union." [R. 251.] Why "David Hyun" might not also have been attending such meetings as he described as an invited observer, with an interest in the subjects and discussion because of union representation, is a question neither answered, nor asked.

The four *ex parte* depositions described above constituted the *only* government evidence against the petitioner. On the basis avowedly of such depositions, the Hearing Officer recommended an order for petitioner's deportation. [R. 94-98.]

As previously observed, the Hearing Officer denied all motions by counsel for petitioner for production of the witnesses for cross-examination and confrontation, or for transportation of petitioner, or counsel, or both, all alternatively, to the witnesses for confrontation. [R. 117, 119, 130, 132-133, 216, 220.] The Hearing Officer declared simply:

> "In deportation proceedings the government does not have the burden of sending the respondent or his counsel to the place where the depositions are taken. Therefore, your objection on that ground is overruled."
>
> —[R. 130].

Petitioner duly filed exceptions to the proposed order of deportation of the Hearing Officer, the exceptions being addressed in course of law to the Commissioner of the Immigration and Naturalization Service. [R. 65-67.] The Assistant Commissioner, August 1, 1951, adopted and approved the decision of the Hearing Officer, and ordered deportation of petitioner. [R. 59-62.] In his decision, the Assistant Commissioner, respecting the taking of the depositions in Hawaii without the presence of petitioner, stated simply:

> "Counsel . . . protests that the hearing officer permitted depositions to be taken in Hawaii, without providing transportation to that place for the respondent or counsel. The law requires no such provision."
> —[R. 61].

Petitioner duly appealed the order of the Assistant Commissioner to the Board of Immigration Appeals. Before the said Board, the final and dispositive administration agency beneath the Attorney General, petitioner, through counsel [R. 62-64], once again protested the procedure of the *ex parte* depositions, taken without the presence of petitioner, as violating due process and fair hearing, and once again moved that at least for the purposes of cross-examination provision be made for a hearing to be conducted in petitioner's presence, urging that the witnesses be ordered produced in Los Angeles, at the place of hearing, or that petitioner be transported to Hawaii, by the government, and at government expense, with whatever guards be deemed needed, and observing that petitioner was without financial funds to pay to send

himself, with guards, there, at private expense.* Counsel emphasized that the depositions constituted the *sole* evidence of substantive deportability. [*"Attorney*: * * * The core of the charge—the main thing—was evidence taken in Honolulu."—R. 64.]

December 1, 1952, the Board of Immigration Appeals denied all the said objections and motions of counsel, and affirmed the order of the Assistant Commissioner. [R. 56-58.] Respecting the taking of the depositions in Hawaii without presence by petitioner, the Board of Immigration Appeals, in its opinion, declared:

> "Counsel now contends that the alien is not financially able to send a representative to Honolulu to appear for him, and was not able to do so in November or December of 1950. There is no provision of law or regulations which requires that the United

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*"Attorney: The only evidence against him in the case consisted of testimony taken by deposition, of witnesses in Honolulu. [The] alien, who at that time was in custody throughout the hearings, was told that he can have someone present there, and he was told either at that time or at the time when the depositions were taken, that if he wanted to, and was willing to pay the expense of himself and I presume of at least two guards to accompany him from California to Honolulu, he might have been present at Honolulu where the depositions were taken. Obviously he had not the money to do that, or to hire an attorney in Honolulu. He did have an attorney in California. * * *

Mr. Ludwig [Board member]: Did he have an attorney or any representative at the time the deposition was taken in Honolulu?

Attorney: *No*, Sir: Nobody represented him there. * * *

Chairman: Your application is what, specifically?

Attorney: My application is that the case be sent back for a hearing so as to produce competent testimony, not by deposition.

Chairman: You want to bring the witness from Honolulu to San Francisco?

Attorney: That's correct: It's a burden upon the Government. I don't think due process can be done away with because it might be somewhat expensive to the Government. That was the argument in the case in which Mr. Justice Jackson just refused to listen to that. The fact it is going to be an expense is not enough to take away due process. * * *

Chairman: All right, Sir." [R. 63-4.]

States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the state of California and depositions were taken in Hawaii."

—[R. 56-58].

Thereafter, warrant of arrest for deportation was issued, December 18, 1952. [R. 55-56.] After intervening proceedings not material here, petitioner, on July 24, 1953, filed petition in the District Court below for Habeas Corpus, challenging the validity of the said order for his deportation, and the administrative hearing, for denial of procedural due process of law, insufficiency of evidence, and for unconstitutionality in the deportation statute in providing for deportation of persons for mere membership *in se* in the Communist Party, by name, as a named organization. [R. 3-10.]

Upon Habeas Corpus it was conceded by the government that the place to which deportation was intended was South Korea [R. 13]; petitioner, as a Korean whose expressed views had often, and avowedly, been hostile to and critical of Syngman Rhee, and of the present South Korean government, claimed jeopardy of physical persecution, or of death, if deportation should be ordered to such country.* [R. 6-7.]

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*A hearing was opened on this issue of physical persecution in the Administrative Agency during the period of this review proceeding. Petitioner introduced massive documentary material evidencing the jeopardy of physical persecution, or death, to any political opponent of Syngman Rhee who might be deported there. After hearing an administrative order staying temporarily deportation to South Korea (though not elsewhere) because of jeopardy of physical persecution was entered, and such stay is presently in operation. However, stay orders of this character, under the statutes are discretionary, and temporary only, and do not eliminate or quiet jeopardy since they are subject to recall with no certainty of right.

The District Court, after reviewing the record of the administrative proceedings, on August 21, 1953, sustained the order of deportation and denied the petition for Habeas Corpus. [R. 37-38.]

Petitioner duly appealed. [R. 39.]

The Court below, Court of Appeals for the Ninth Circuit, affirmed the judgment of the District Court, and sustained the validity of the deportation proceedings and of the order for deportation. [*Hyun v. Landon,* 219 F. 2d 404; R. 45-53.] Upon the subject of right of presence and the taking of the depositions in Hawaii, the Court below stated:

> "It is contended by appellant that the action of the Immigration Service in taking the depositions of Uesugi and Izuka in Honolulu, while he was in custody in California, deprived him of the essential ingredients of due process of law. The argument is that not only was Hyun in the custody of appellee at the time the depositions were taken but that he was financially unable to transport his counsel to Honolulu or to procure Honolulu counsel to represent him at the depositions. In view of the comparative financial resources of Hyun and the Government of the United States, and in further consideration of the plethora of government transportation between Hawaii and the west coast, it is appellant's contention that the government should have transported the witnesses to the west coast for the depositions, or in the alternative provided transportation to Hawaii for Hyun and his attorney. Failure to do either, it is alleged, deprived appellant of essential ingredients of due process of law. * * * This Court has repeatedly held that financial inability of an alien to insure attendance of himself or his attorney, or both, at

the place where depositions are being taken is not a denial of due process. As was stated in *Bhagat Singh v. McGrath*, 1939, 9 Cir., 104 F. 2d 122, 123: 'Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition * * * We have heretofore decided that the fact that an alien is financially unable to travel to a place where he could cross-examine the witnesses, or send an attorney is not a denial of the right of cross-examination.'"

—[R. 47-48; 219 F. 2d at pp. 406-407].

Summary of Argument.

Petitioner urges that the conducting of his trial below without his *presence*, and by means of "depositions" conducted in Hawaii 2500 miles from place of trial, without presence by him at such proceedings and without agreement or waiver, in lieu of requiring production at the trial proceedings of all witnesses for purposes of direct and live presence, confrontation, and cross-examination, deprived petitioner of due process of law under the Fifth Amendment to the Constitution.

The right of presence, in proceedings affecting liberty or life, has been said by this Court to be *"fundamental"* to Constitutional hearing—"scarcely less important . . . than the right of trial itself."

Petitioner's proceedings were in deportation and placed in issue gravest jeopardies to liberty, and even to life. They affected an alien life-resident in the United States, married to a citizen wife, and the father of two minor citizen sons, and deportation was purposed to a country of destination, South Korea, bearing acknowledged jeopardy and risk even of physical persecution, or of death.

The depositions below were taken without compulsion of necessity, and were undertaken for convenience only. The witnesses affected were all living, in good health, and within the jurisdiction of the United States and answerable fully to Federal scope and power of process.

The depositions, when taken, were *ex parte*, and without presence by petitioner at their conduct. Petitioner was in custody at the time concerned, and throughout the whole of his proceedings, and control of his presence was in the Service's hands. He was not rendered present at the depositions, nor in advance of such even advised he could, by *any* course, be so; he was advised only that his *counsel* could be present, or that there could be submitted on his behalf written interrogatories for purposes of cross-examination. After the fact only—after the deposition proceedings were completed and had, petitioner was told that, had he "asked" so, he could have been privately transported to Hawaii, under security of guards, to have been present at the deposition taking, but this at his private expense and financing only, including transporting of guards, and hence an offer without availability to petitioner in any event, he being without means or financial capacity to invoke such.

The *ex parte* depositions affected not merely incidental or cumulative matters, but constituted the *sole* substantive evidence of alleged deportability. In consequence petitioner's trial was *total* trial *in absentia*. The naked right even to be present at one's hearing and judgment was denied. In consequence there were denied, as well, the included rights subsumed within, and incident to, right of presence, including right of confrontation, right of cross-examination, and right to assist and participate with, and be assisted by, counsel.

All of these fundamental rights, indispensable to fair hearing, were denied peremptorily, and totally, below upon rationale only that deportation proceedings are said to be *"civil"* in "character", and that in consequence process appropriate to property contests only, in purely private, civil causes, is sufficent there, and that none of the rights of confrontation, cross-examination or secured presence need be secured, and that depositions may be undertaken freely and without limitation. Said the Court below, simply: "Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition."

The error here is *fundamental.* Due process of procedure, and the requirements of Constitutional fair trial, do not vary thus by the mere name and form of proceedings, as "civil" as separated from "criminal", but vary only with the *substance* of hearings and proceedings—with whether the proceedings affect matters of *property* rights only, and are private in nature of litigation, or affect matters of *liberty*, or *life*, and are public, and involuntary.

The Service, and the Court below, shortly stated, gave petitioner *property* process only, in a matter where the Constitution required liberty-life process, and secured, safeguarded fair trial. "Due process" requires safeguarded, fair process for matters affecting liberty and life, and requires, among other indispensable securities there, mandatory and secured *right of presence.*

The origin of this is the circumstance that *public interest*, as well as mere private concern, requires in matters affecting jeopardy of life, body or liberty, fairest and safeguarded hearing and judgment. Without such,

the judgment and condemnation of any single individual disquiets, and fundamentally, all of society.

That fair trial affecting liberty or life requires secured and mandatory right of presence is conceived in criminal causes self-evident—a basic and undeniable requirement of indispensable due process of law. It is protected there, and has been anciently, as a matter of judicial right, as well as under numerous and varied "criminal-right" statutory and constitutional provisions, both state and Federal. It is secured, as well, and *additionally and separately*, by requirement of *due process of law* under the *Federal Constitution*.

It is the latter circumstance which is invoked at bar. It is upon the rock-premise guarantee of right of presence in criminal trial affecting liberty or life by *due process* upon which petitioner builds. It is not as a criminal-right privilege, but as a *due process right of liberty fair trial* that petitioner premises right of secured presence in deportation causes affecting liberty and life, as at bar.

Not relevant or reached at bar, therefore, are the decisions or statements of this Court indicating that the strictly criminal-rights provisions of the Constitution, as the *ex post facto* clause, or the jury trial security, do not obtain in deportation. These do not gainsay that *due process* and procedural right of fair trial DO obtain there, and petitioner seeks right of presence, including right of confrontation, cross-examination, right to aid of and be aided by, counsel, and other included securities subsumed within presence, as a secured and mandatory right, *not* as deriving from, or upon analogy to, the security of such matters as provided in the criminal-rights provisions of the Sixth Amendment, but, in important

and critical difference, as securities of due process under the Fifth Amendment.

The rights secured by *due process* affecting liberty or life, if surveyed, evidence upon their face that all are related to, and crucial to, fair, safeguarded hearing. All the basic due process rights secured in criminal hearings, as right to freedom from violence or coercion in trial proceedings, right to judgment by an impartial judge free from purpose or self-interest to convict, right to notice of the charges laid, right to public trial, and right to facilities and time to subpoena or produce witnesses or evidence in fair defense—all are plain on their face in their direct relation to *fair, safeguarded trial.* Without safeguard of such minimal securities and rights where liberty or life may be forfeited, trials for crime would self-evidently violate "fundamental fairness."

So, too, with right of mandatory, secured presence of the accused. Judgment where life or liberty may be forfeited, if not had to the face of and in the presence of the accused, "shocks the conscience". Hence, where in a deportation cause, as at bar, consequences as serious as in a criminal cause with respect to jeopardy to liberty, or to life, are involved, right of secured presence of the accused, as the other minimal rights of fair trial under due process affecting liberty or life listed above, is guaranteed and made mandatory by the Fifth Amendment.

The requirements of due process of law in two areas outside deportation confirm and make evident that in non-criminal causes where liberty, limb or life are placed in jeopardy, like process to criminal fair process, in terms of minimum requirements of due process of law and fair hearing, are required by the Constitution. These areas are (1) insanity confinement proceedings, and (2)

asexualization proceedings. In both of these areas, principle and decided law make plain that mandatory, secured right of presence is an indispensable element to fair trial—and hence to due process—in such proceedings, as much as in directly criminal trials, notwithstanding that in both such cases the proceedings concededly are "civil" in name and form, and notwithstanding that the purpose of society in both such cases is curative, and not to punish.

It would as much shock conscience, and offend the requirements of the Constitution, to imprison a man as insane, or subject him to compulsory operation upon his body for sexual sterilization, where he contested and denied the facts laid against him as basis in either case so to act, in proceedings held without respect for mandatory, secured right of presence, as to imprison or punish him corporally, or take his life, in proceedings with like denial of right, for asserted "crime". Due process being a matter of *substance* prohibits such violation of individual security and right in all such stated cases, and equally.

By like matter of principle, and with like force, it prohibits such denial of right, as well, in deportation proceedings with consequences equally bearing jeopardy to liberty and life, as at bar.

It is to be noted, furthermore, at bar that particular circumstances especially aggravated the denial of fair trial in denial of right of presence: the denial was *total,* and the "depositions" taken without presence were the *sole* evidence offered on the issue of substantive deporta-

bility, and hence petitioner's trial, in substance, was *total trial in absentia;* also, identification by passport-photo, bearing name of the accused on its face, was substituted for right of confrontation, and formed the identification basis for all testimonial examination; the character of the examination was grossly leading and particularly required the restraint of right of presence; the denial of presence was *needless,* and for convenience and accommodation alone; the subject matter of the examination related in no instance to illegal act but only to speech and expression of opinion, and lay within the area guarded and reached by the First Amendment, and required thereby particular safeguard and restraint.

Finally, it is to be observed that the issues involved at bar rise far beyond the individual case of petitioner and present a fearsome precedent. A ruling is sought at bar by the government to so limit procedural rights in deportation as to permit taking of *ex parte* depositions far removed from the place of hearing and without provision for attendance by the alien or counsel, in any deportation proceedings at the pleasure of the government. If such a precedent be established the spectacle is presented of possible wholesale use of depositions, particularly in political deportations, with accusations made *ex parte,* and by informer-accomplice witnesses, without check or restraint whatever by confrontation or cross-examination.

ARGUMENT.

THESIS: DUE PROCESS OF LAW REQUIRED MANDATORY RIGHT OF PRESENCE OF THE ACCUSED (PETITIONER) AT THE DEPORTATION PROCEEDINGS BELOW.

Introduction.

The Court below, on thesis that deportation is "civil," and therefore that property process, sufficient for purely private, civil causes, was sufficient and fair enough there, and that right of confrontation or presence need not be observed and depositions might be freely and without restriction employed, approved proceedings violating one of the most basic securities of fair trial affecting liberty or life, the right of presence.

Petitioner attacks the "civil proceedings" rationale above stated of the Court below, and *fundamentally*. Petitioner attacks such, however, not on basis that deportation is to be technically classed as equateable to criminal proceedings, though that could be urged, and forcefully, but on basis, rather, that due *process* and *right of fair trial* are determined in content, and in requisites, not by form, but by *substance*—not by whether the proceedings are classed "civil" or "criminal" in name and characterization, but by whether the same affect merely property matters, in private, civil litigation, or affect matters of liberty or life in compulsory proceedings instituted by government acts. Life, and liberty (which is but a leasehold portion of life), in petitioner's thesis, is *superior* to property in human value, and basically, and is qualitatively separated therefrom in requirements of due process fair trial.

Petitioner's thesis builds, in important beginning, upon right of presence in meanest misdemeanor criminal trial.

The procedure accorded petitioner below would have been held to violate confrontation and right of Constitutional fair trial *out of hand,* had such occurred in criminal cause of whatever character, and particularly if, as at bar, affecting liberty and life. Petitioner was in custody by the Service throughout his hearings and he was not rendered present at the Hawaiian depositions. Only after the fact was he even advised he conceivably could have been present, had he "asked" so, and had he been able to offer and provide private transportation of himself, and of Service guards to secure him—an alternative petitioner was without means, in any event, to invoke. Such procedure would be disapproved *out of hand* as violative of Constitutional safeguard of fair trial and right of presence, in criminal cause. Resort to depositions, in lieu of production of live witnesses at the hearing, save in circumstances and situations of *necessity,* violates *fundamentally,* and as an *elementary and basic* circumstance, secured right of presence in criminal causes.

Mandatory right of presence of the accused, with right of confrontation, cross-examination, and of counsel, is secured in criminal causes as a matter both of common law and special "criminal-right" statutory and constitutional provisions, state and federal, and, *separately,* as a matter of *Constitutional due process of law.* It is upon premise and foundation based on the latter circumstance that petitioner builds.

It is not that petitioner seeks to equate deportation to criminal proceedings, as such, in thesis, but that *due process* equates all proceedings—criminal, deportation and whatever—affecting liberty and life, in requiring mandatory right of safeguarded, fair hearing, including *right of presence.*

Understanding of right of presence as a requirement of due process fair trial begins with security of right of presence as a due process right in criminal trials, because the origins and content of liberty-life due process fair hearing begin there, both in terms of history and of frequency of consideration and analysis. It will be found, as might be foreseen, that right of presence there is a right at once ancient, deeply-valued and many times secured and protected, both directly and indirectly, explicitly and implicitly, in sources additional to and separate from Federal requirement of due process. There will emerge, however, ultimate certainty, that separate from and independent from all other guarantees thereof, presence is required in any and every criminal cause, and particularly where affecting liberty or life, by *Federal due process of law*, because such right is *indispensable* to fair, safeguarded hearing.

It is by token of this indispensable relation of mandatory presence of the person affected to fair hearing and judgment, in proceedings wherein the liberty or life of such individual may be forfeit, and because only of this, that presence in such proceedings has been constituted a Constitutional prerequisite to due process fair trial. It is a matter of public concernment. Society cannot afford to be careless in matters affecting liberty or life. Hence, *as an interest of society* as much as of the individual, before heaviest blows, there must be fairest hearing.

By consequence of exactly parallel reasoning and principle, mandatory presence is equally required by due process of procedure in *deportation* proceedings, as at bar, bearing jeopardy to liberty and life. Moreover, in other non-criminal proceedings outside deportation affecting liberty, limb or life, there is corroboration that due

process fair hearing requires secured right of presence. Both in insanity confinement matters, and in asexualization-operation proceedings, right of presence is plainly a security of due process fair trial; by equal token it is required in deportation proceedings, as at bar, affecting liberty and life.

I.

The Right of Presence, Subsuming and Including Right to Confront and Be Confronted by All Witnesses and by One's Judges, Right of Free Cross-examination, Right to Aid and Be Aided by Counsel or to Act as One's Own Counsel, and Right to Observe and Particpate Fully in the Entirety of One's Proceedings, Is Basic Utterly in Criminal Trial in All Anglo-American Jurisdictions by History, by Principle, and by Constitutional, Statutory and Judicial Guarantee, and, Under the Federal Constitution, Is Included Within the Minimum Requirements of Fair Trial Secured Mandatorily by Due Process of Law.

Approved below is an order of deportation and exile for a man who has lived all the meaningful years of his life in the United States, with purpose presently by government to expel him forcibly from his home, his homeland, his work and his family, including citizen wife and two citizen children, and by deportation to subject him to a form of international outlawry and to jeopardy including even hazard of physical persecution or death—on a "trial" which could not have been undertaken in Federal jurisdiction or in any of the forty-eight states for the meanest misdeameanor punishable by five days in jail, or even by five dollars' fine, a "hearing" conducted in denial of the single right perhaps most basic to fair

judgment of all rights projected by right of trial at all—*the right of presence.*

In criminal causes mandatory, secured right of presence of the accused, throughout the whole of his trial, that he may be tried and judged openly, publicly and to his face, is conceived *not merely a right*, but a *public necessity* of fair trial, an indispensable requirement of fair and safeguarded judgment. In consequence, under every statute and constitution in every American jurisdiction, state, federal and territorial, in every period of our history, and at common law, it has universally been provided, explicitly and implicitly, that mandatory right of the presence of the accused at his trial shall be in absolute measure honored and secured. The right is particularly inviolate in *serious* criminal causes—felony causes, and crimes bearing corporal or capital punishment—but unless waived, or unless forfeited by act of misconduct, the secured right of presence is provided and guaranteed in all criminal trials and proceedings in whole.

> "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."
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> —*Lewis v. United States*, 146 U. S. 370, 372.

> "In the United States, almost all Constitutions have given a permanent sanction to the principle of Confrontation, by clauses requiring that in criminal cases, the accused shall be 'confronted with the witnesses against him' or 'brought face to face' with them."
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> —Wigmore on Evidence, Vol. V, p. 127. (Collecting constitutional citations.)

> "The Constitutions of most of the United States, incorporating in this an old common law principle,

provide that the accused, in criminal cases, shall have a right to meet the witnesses against him face to face. Even where this is not a part of the fundamental law of the land, it is held obligatory by the courts."

—Wharton, "Criminal Pleadings and Practice" (9th Ed., 1889), p. 392.

"The testimony for the people in criminal cases can only . . . be given by witnesses who are present in court. The defendant is entitled [by Constitutional right] to be confronted with the witnesses against him; * * * [Moreover, in] cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until final judgment. If he be absent . . . there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment."

—Cooley, "Constitutional Limitations" (8th Ed.) Vol. I, pp. 662-667. (Collecting authorities.)

"In the absence of a permissible waiver, . . . under constitutional or statutory provisions to that effect and at common law, an accused charged with a felony is entitled to be present, and for a valid trial and conviction, must be present, at every stage of the trial, or at least when any important or substantive step is taken."

—23 C. J. S. pp. 303-304. (Collecting authorities.)

The right is many-sided—as well in purpose and safeguard as in origin and expression of its guaranty. Thus it derives in guaranty in part from the right of

confrontation, and it certainly includes and encompasses that right, including right to confront one's judges, as well as witnesses both favorable and opposed. It includes as well the right of cross-examination. It partakes and derives also in important measure from the guarantee of right of counsel, presence being integral to right to aid and be aided by one's counsel, or to act, on choice, as one's own representative. Also, it is in important part implicit in a guarantee of right to jury trial, or to trial by court, confrontation of and by the jury or court being an element implicitly assumed in such. It is a part, also, of right to a public hearing. Thus it is implicit in most of the specific rights secured under the Sixth Amendment to the Federal Constitution, and in the counterpart provisions to such in state constitutions; some state statutes and constitutions, additionally, make separate and explicit provision, in very terms for the right of an accused to "appear" and/or "be present." However, whether deriving protection from explicit or implicit statement, or both, the right is *universal* in security, and in the recognized worth of its safeguard.

> "To allay the apprehensions of the people lest the federal government invade their liberties, the first ten amendments to the Constitution were adopted. The Sixth assures one accused of crime that if prosecuted under federal law, he shall have a public trial, be informed of the nature and cause of the accusation, be confronted with the witnesses against him, and have the assistance of counsel for his defense. But the purpose that all trials, in state as well as national tribunals, should not lack the same quality of fairness, is evidenced by the embodiment of a guarantee of similar import in the constitution of every state in the union. Out of excess of caution,

the fundamental law of many of the States specifically safeguards the right of the accused, 'to appear and defend in person.' [Collecting constitutional citations.] [These] mere differences in phraseology have not obscured the fact that all these instruments were intended to secure the same great privilege—a fair hearing. Accordingly, the courts have uniformly and invariably held that the Sixth Amendment, as respects federal trials, and the analogous declarations of right of the state constitutions touching trials in state courts, secure to the accused the privilege of presence at every stage of his trial. This Court has so declared. In commenting upon the section of the Philippine Civil Government Act, which extends to the accused in all criminal prosecutions 'the right to be heard by himself and counsel,' this was said: 'An identical or similar provision is found in the constitutions of the several States and its substantial equivalent is embodied in the Sixth Amendment to the Constitution of the United States. . . . In cases of felony, our courts, with substantial accord, have regarded it . . . as being scarcely less important to the accused than the right of trial itself.'

"And, as if to make assurance doubly sure, the legislatures of many of the States have adopted statutes redundant to the constitutional mandate, explicitly declaring the right of the accused to be present at his trial. [Collecting statutory citations.]"

—*Snyder v. Massachusetts,* 291 U. S. 97, 129-131, Mr. Justice Roberts, dissenting on grounds not material here, Mr. Justice Brandeis, Sutherland and Butler, concurring.

In *Kirby v. United States,* 174 U. S. 47, 54-55, right of presence was attempted by statute to be circumvented in a prosecution affecting a charge of receipt of stolen

property. In a trial of the alleged receiver, a Federal statute attempted to make the prior conviction of the alleged primary thief record evidence (albeit not conclusive) of the fact of theft. Said this Court there:

> "The record of the conviction of the principals could not however be used to establish, against the alleged receiver, charged with the commission of another and substantive crime, the essential fact that the property alleged to have been feloniously received by him, was actually stolen from the United States. Kirby was not present when Wallace and Baxter confessed their crime by pleas of guilty, nor when King was proved to be guilty by witnesses who personally testified before the jury. Now was Kirby entitled of right to participate in the trial of the principal felons. * * * One of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that 'in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him.' Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection, and the evidence in which was not given in his presence. . . . [A] fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial of conduct of criminal cases."
>
> —*Kirby v. United States,* 174 U. S. 47, 54-55.

Commenting upon the significance and scope of a provision of the Philippine Civil Government Act, comparable to the Federal Sixth Amendment and securing right of confrontation and right "to be heard by himself and counsel," this Court in *Diaz v. United States,* 223 U. S. 442, 454-455, observed:

> "An identical or similar provision is found in the constitutions of the several States, and its substantial equivalent is embodied in the Sixth Amendment to the Constitution of the United States. . . . In cases of felony, our courts, with substantial accord, have regarded it [right of presence] as extending to every stage of the trial, inclusive of the impanelling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself."
>
> —*Diaz v. United States, supra,* 223 U. S. at pp. 454-455.

Accord:

> "The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with. This court in *Hopt v. Utah,* 110 U. S. 574, 579 [observed] that the public has an interest in the life and liberty of the accused, and that neither can be lawfully taken except in the mode prescribed by law. . . ."
>
> —*Schwab v. Berggren,* 143 U. S. 442, 448.

> "[A] prisoner has no absolute right to argue his own appeal or even to be present . . . in an appellate court . . . The absence of [such] right is in sharp contrast to his constitutional prerogative

of being present in person at each significant stage of a felony prosecution, see *Hopt v. Utah*, 110 U. S. 574, and *Snyder v. Massachusetts*, 291 U. S. 97, and to his recognized privilege of conducting his own defense at the trial."

—*Price v. Jonhston*, 334 U. S. 266, 285.

Comparable declarations and expressions of the inviolable quality, and indispensable worth and value, of the right of presence of the accused in criminal causes, have been voiced by the state courts, as well, and since earliest recorded decisions. Witness the state declarations below:

"It is of the very essence of a criminal trial . . . that the accused shall be brought face to face with the witnesses against him [and] also with his triers."

—*Temple v. Commonwealth* (1879), 77 Ky. 769, 771.

"These great common-law requirements have been made constitutional provisions in the various states [and require, among other things, that] the accused must be present in court to meet the witnesses face to face . . . * * * These are great constitutional safeguards against oppression and injustice that must not be abridged or compromised. * * * [Presence] is . . . the indispensable right of the accused."

—*French v. State* (1893), 85 Wis. 400, 410-411, and at p. 409.

"It is fundamental in Anglo-Saxon jurisprudence that the defendant charged with a felony shall be permitted to be present at every stage of trial."

—*Commonwealth ex rel. Milewski v. Ashe* (1950), 363 Pa. 596, 601, 70 A. 2d 625.

In *State v. Hurlbut* (Conn. 1784), 1 Root 90, it is declared that a criminal trial without presence is "a nullity" because "[the] defendant must appear, or there will be no propriety in receiving the verdict."

In *Prine v. Commonwealth* (1851), 18 Pa. 103, 104, it is stated that to violate the right of presence in a criminal cause would be to violate "the dictates of humanity."

In *Andrews v. State* (Tenn., 1855), 2 Sneed 550, 553, it is declared requirement of presence in criminal trials is "founded in the justice and wisdom of the common law," and is "necessary to the full and free exercise of the right of the accused to make his defense."

Accord:

> "If it is shown that [a criminal defendant] was absent during the taking of any essential step in the trial, he cannot be said to have had a trial in due course of law."
>
> *Summeralls v. State* (1896), 37 Fla. 162, 164.

> "If there is anything fundamentally and well established in criminal procedure it is the right of an accused person, on a felony charge, to be present during all of the trial."
>
> —*State v. Chandler,* 128 Ore. 204, 208, 274 Pac. 303.

> "Out of abundant tenderness for the right secured to the accused by our constitution, to be confronted by the witnesses against him, and to be heard by himself or counsel, our court has . . . held that it must be shown by the record that the accused was present in court pending the trial. This is upon the ground of the peculiar sacredness of this high constitutional right."
>
> —*Dyson v. Mississippi* (1853), 26 Miss. 362, 383.

Also declaring the utterly fundamental character of mandatory, secured right of presence of an accused in criminal causes, see:

Ponzi v. Fessenden, 258 U. S. 254, 260;
Shields v. United States, 273 U. S. 583, 588-589;
Williams v. New York, 337 U. S. 241, 244-246;
Slocovitch v. State, 46 Ala. 227, 228;
Whittaker v. State, 173 Ark. 1172, 1178, 294 S. W. 397;
Holton v. State, 2 Fla. 476, 500-501;
Chance v. State, 156 Ga. 428, 430-433, 119 S. E. 303;
People v. Beck, 305 Ill. 593, 596-599, 137 N. E. 454;
Batchelor v. State, 189 Ind. 69, 76-78, 125 N. E. 773;
State v. Reidel, 26 Iowa 430, 436-438;
Riddle v. Commonwealth, 216 Ky. 220, 221-222, 287 S. W. 704;
State v. Hutchinson, 163 La. 146, 147-148, 111 So. 656;
Duffy v. State, 151 Md. 456, 472-477, 135 Atl. 189;
Frey v. Calhoun, 107 Mich. 130, 131, 64 N. W. 1047;
Foster v. State, 70 Miss. 755, 764-767, 12 So. 822;
State v. Hoffman, 78 Mo. 256, 258-260;
State v. Vanella, 40 Mont. 326, 333, 106 Pac. 364;
Miller v. State, 29 Neb. 437, 440-441, 45 N. W. 451;
People v. Perkins, 1 Wend. (N. Y.) 91, 92;
State v. Thomas, 64 N. C. 74, 75-77;
State v. Dixon, 185 N. C. 727, 729-730, 117 S. E. 170;

State v. Schasker, 60 N. D. 462, 464, 235 N. W. 345;

Cole v. State, 35 Okla. Cr. 50, 51-56, 248 Pac. 347;

Gray v. State, 158 Tenn. 370, 371-373, 13 S. W. 2d 793;

Brown v. State, 38 Tex. 483, 484;

Schafer v. State, 118 Tex. Cr. Rep. 500, 502-505, 40 S. W. 2d 147;

State v. Mannion, 19 Utah 505, 508-515, 57 Pac. 542;

Palmer v. Commonwealth, 143 Va. 592, 603-608, 130 S. E. 398;

State v. Shutzler, 82 Wash. 365-368, 144 Pac. 284;

State v. Howerton, 100 W. Va. 501, 502-504, 130 S. E. 655;

Wharton, "Criminal Pleading and Practice" (9th Ed. 1889), Ch. IX, "Presence of Defendant in Court";

Bishop, "New Criminal Procedure" (4th Ed.), Vol. I, Ch. XVIII, "The Presence of the Prisoner in Court";

23 C. J. S. 973;

Annotations, 100 A. L. R. 478-487, 6 A. L. R. 2d 997-1002;

Rule 43, Federal Rules of Criminal Procedure;

Note to Rule 45, Preliminary Draft of Federal Rules of Criminal Procedure (1943), (Collecting authorities);

Barron & Holtzoff, "Federal Practice and Procedure" (Rules Ed., 1951), Vol. IV, pp. 394-395;

Cyclopedia of Federal Procedure (3d Ed.), Vol. XI, Sec. 39.79 and Sec. 43.01, n. 3.

Whitman, "Federal Criminal Procedure" (1950), Sec. 43.3, p. 348;

Orfield, "Criminal Procedure From Arrest to Appeal" (1947), pp. 413-417;

Note (1955), 12 Wash. and Lee L. Rev. 230-238;

Note (1949), 23 Temple L. Q. 151-153;

Note (1950), 28 N. Car. L. Rev. 205-215.

The right derives from origins deep in the history of the common law. Thus:

Blackstone:

". . . process must issue to bring him into court; for the indictment cannot be tried unless he personally appears: According to the rules of equity in all cases, and the express provision of Statute 28, Edward III, c. 3 (Right of Trial, 1354), in capital ones, that no man shall be put to death without being brought to answer by due process of law."

—4 Blackstone, "Commentaries" (1769) *318.

Coke:

"But in criminall [*sic*] cases of life or member, the jury can give no privy verdict, but they must give it openly in court."

—2 Coke on Littleton, 227b.

Hale:

"In a case of felony or treason the verdict must be given in open court, and no privy verdict can be given. * * * [Further, in] capital causes, whether upon indictment or appeal, no verdict can be given by default in the absence of the party."

—2 Hale, "Pleas of the Crown" pp. 300, 298.

In *Rex v. Ladsingham,* Sir T. Raym., 193, 83 Eng. Rep. 101, it is recorded, "[No] privy verdict can be given in criminal cases which concern life, as felony, because the jury are commanded to look upon the prisoner when they give their verdict, and so the prisoner is to be there, present at the same time; . . ." In *Rex v. Ledgingham,* 1 Ventris 97, 86 Eng. Rep. 67, the law is stated: "In an information against him for the King, the Court took a privy verdict, and so it was said was the usual course at the assizes. But it cannot be so in cases of felony and treason, as it said in the 1 Inst. 227b."

Upon these authorities, Bacon summarized the law:

> "[It] is laid down, that a privy verdict cannot be given in a case of felonies; because the jury are directed, and ought, in such a case, to look upon the prisoner when they give their verdict."
>
> —Bacon, "A New Abridgement of the Law" (5th Ed., Corrected), Vol. VII, p. 3.

See also, expressing and confirming right of presence, at even earliest common law:

Rex v. Vipont (1761), 2 Burr 1163, 97 Eng. Rep. 767-769;

Rex v. Aikin (1765), 3 Burr 1785, 97 Eng. Rep. 1098, 1099;

Rex v. Crowther (1786), 1 T. R. 125, 127, 99 Eng. Rep. 1009-1011;

Rex v. Baker (1745), 2 Strange 1239, 93 Eng. Rep. 1156;

Rex v. Niccolls (1745), 2 Strange 1227, 93 Eng. Rep. 1148;

Rex v. Legingham (1670), 2 Keble 687, 84 Eng. Rep. 432;

Rex v. Harris and Duke (1689), 1 Ld. Raym. 267, 482, 91 Eng. Rep. 1075, 1221;

Regina v. Templeman (1700), 1 Salk 56, 91 Eng. Rep. 54;

Rex v. Hayes (1730), 2 Strange 843, 93 Eng. Rep. 888.

Accord:

Ball v. United States, 140 U. S. 118, 129-131;

Wharton, "Criminal Pleading and Practice" (9th Ed.), p. 392.

Historically mandatory right of presence of the accused in criminal causes arose in earliest common law periods because a *necessity* simultaneously both of *trial* and of a *defense.* In the forms and concepts of trial then obtaining—battle, ordeal and compurgation—presence was indispensable both to right of defense and to conduct of trial at all. Thus, in trial by battle, without presence of the accused there could be no battle, and, therefore, no trial; neither could there be for the defendant the means for acquittal or release. So, too, with trial by ordeal. Without presence of the accused to undergo before God ordeal by water or iron, there could be there no trial; neither could there be the means for vindication. Similarly with trial by compurgation. Both for trial and defense there presence of the accused was required, that he might participate. (Stephen, "A History of the Criminal Law of England" (1833), Vol. I, Chs. VIII and IX, and especially pp. 244, 246, 254 and 73; Pollock and Maitland, "A History of the English Law" (2nd Ed.), Vol. II, pp. 598-603; Note (1916), 16 Col. L. Rev. 18-36; Note (1955), 12 W. & L. L. Rev. 230-238; Orfield, "Criminal Procedure from Arrest to Appeal" (1947), pp. 345-346.)

Similarly, in the earliest employments at common law of trial by jury, the accused's "consent" to the jury was conceived indispensable, and without it neither trial nor conviction could be had. Hence presence of the accused was indispensable either that he might declare his consent or that he might be subjected to coercion and torture, particularly *"peine forte et dure,"* purposed to force his consent if withheld. (Stephen, *supra,* at p. 299.) Further, even when jury trials were accepted of course, until comparatively recent years, the accused in criminal trials in English common law was secured no right of counsel, and no right against self-incrimination, and his own examination was the central point of his criminal hearing; hence his presence was mandatory in law for his trial as well as for his opportunity of defense. (Stephen, *supra,* at p. 440; Orfield, *supra,* at pp. 349-351.)

However, with the transformation of mode of trial from ordeal, battle and compurgation, to jury trial of right and course ("by the country"), and with the development of the latter from early to modern content, the requirement of presence became secured ultimately as a matter of dignity and right, as an indispensable element in a fair hearing. With the development of English law to award the defendant all the present day rights of trial, including right to public hearing, right to counsel, immunity against self-incrimination, and right to confrontation and cross-examination, and with the development of the rules excluding hearsay evidence and confining the role of witnesses to the relation of facts known by sight or hearing, the right of presence of the accused at trial in criminal proceedings assumed its ultimate and present quality as an *indispensable safeguard and security of fair hearing*—in proceedings predicated upon *evidence*

and conducted under and pursuant to *law*. Thus, Stephen, describing the ultimate right of presence of an accused in modern English law, states the right as follows:

> "The prisoner has a right to be present at the trial . . . [Even if he grossly and violently misconducts himself] it is obvious that in capital cases, or indeed, in any trial involving severe punishment, almost any measures, short of removing [him], should be resorted to."
>
> —Stephen, "A Digest of the law of Criminal Procedure" (1883), Art. 302.

Accord:

Orfield, "Criminal Procedure from Arrest to Appeal," *supra*, pp. 346 *et seq.*

Respecting the ancient common law origins of the right of presence, the New York Court of Appeals has declared:

> "The requirement . . . that the defendant be present in person during a trial for a felony, is of ancient origin. Its origin is to be found in the necessity for the presence of the defendant when criminal guilt was determined by ordeal or by battle. . . . When these methods of trial were abandoned, the presence of the defendant was still necessary. Until comparatively recent times, a defendant in a criminal case was not allowed to be represented by counsel. III Blackstone's Commentaries, c. 25; *Powell v. State of Alabama*, 287 U. S. 45, 60. Although the defendant now is entitled to be represented by counsel, the requirement that the defendant must be present has persisted and is to be found in the statutes or Constitutions of many [actually, of all] of the States."
>
> —*People v. La Barbera* (1937), 274 N. Y. 339, 343, 8 N. E. 2d 884.

Noting origins antecedent even to the common law, the Pennsylvania Supreme Court in *Commonwealth ex rel. Milewski v. Ashe* (1950), 363 Pa. 596, 602-603, 70 A. 2d 625, quoted with approval the whole of the excerpt from *People v. La Barbera* above set forth and added:

> "It [right of presence at the time of sentence] goes back even beyond the common law. Mendelsohn in his book, 'The Criminal Jurisprudence of the Ancient Hebrews,' says in Section 111: 'When the verdict is arrived at, the accused is brought before the bar, and the chief of court declares it. . . .'"

Due Process of Law.

Presence of the accused is, then, a right, ancient, valued, and protected in criminal law, a right declared by this Court to be "scarcely less important to the accused than the right of trial itself." (*Diaz v. United States,* 223 U. S. 442, 455.) A right to trial at all "implies that [the accused] shall have a right to be present." (*Schwab v. Berggren,* 143 U. S. 442, 450.)

Moreover, it is a right secured by *the Federal guarantee of due process of law.*

Wherever and however else it may also be expressed and protected, as in the Federal Sixth Amendment, and state statutory and constitutional counterparts thereto, securing right to trial, to public hearing, to advisement of the charges laid, to counsel, to process, to be confronted by the witnesses and to cross-examine such, and sometimes in very words to "appear" or "be present," the minimal right of an accused in criminal causes to *secured and mandatory right of presence* is protected, absolutely and beyond power of diminution or change, by the Fed-

eral Constitutional guarantee of *due process of law* expressed in the Fifth and Fourteenth Amendments.

That is, presence when tried and judged in criminal causes is a right required not only by state and Federal provisions affecting strictly criminal trials as such, as the Federal Sixth Amendment and the state counterparts, but is, as well, a mandatory requirement of procedural due process of law. By principle, historical import, and by express determination of this Court, right of presence, is—as to criminal causes—a part of those minimal rights of fair hearing secured absolutely by the ultimate boundaries of civilized law "which no member of the Union may disregard . . ." (*Holden v. Hardy,* 169 U. S. 366, 389.)

This determination reaches back to the earliest decisions of this Court treating of right of presence, beginning with the historic decision in *Hopt v. Utah.*

Because no state has ever undertaken to directly deny or repudiate—or even attempted so to do—right of presence in a criminal cause in its core, and its substance, no ruling upon the right, under due process, has been direct. Involved only have been restrictions upon matters affecting the right but indirectly, or in peripheral manner, such as right to be present at such side matters and proceedings as appellate arguments after conviction, or mere passive views by trial court or jury of a geographical site only. Denials of these indirect and peripheral matters have been held, with serious divisions, not to violate alone due process of law.

But that due process secures and guarantees *in substance* right of presence, in its core, has never been disputed or challenged as a matter of established Constitutional law.

In *Hopt v. Utah,* 110 U. S. 574, 579, in earliest beginning, this Court, in addition to holding that right of presence in a criminal trial was secured and protected by a Utah Territorial statute applicable in the proceedings there involved, stated, as well:

> "If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."
>
> —*Hopt v. Utah, supra,* 110 U. S. at p. 579.

In *Dowdell v. United States,* 221 U. S. 325, at page 331, this Court said of the decision in *Hopt v. Utah:*

> "In *Hopt v. Utah,* 110 U. S. 574, this court held that due process of law required the accused to be present at every stage of the trial."

In *Schwab v. Berggren,* 143 U. S. 442, there was involved a denial by a state of right in a criminal defendant to attend appellate argument and proceedings *after conviction.* It was held right of presence under due process did not extend beyond trial conviction and judgment. Said this Court there, nonetheless:

> "The personal presence of the accused, from the beginning to the end of the trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him, may be, and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with. * * * 'If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.' "
>
> —*Schwab v. Berggren, supra,* 143 U. S. at pp. 448-449.

In *Valdez v. United States,* 244 U. S. 432, a claim under due process for denial of right of presence again was

entertained. It was determined there, however, after hearing, that the right, in the circumstances of the case, had been waived, and, alternatively, that in any event the right under due process did not include in its scope the act of a passive view by the trial court of a geographical site, without the taking of testimony or the conducting of any proceedings at such place. It is to be observed that there even the Solicitor General, on behalf of the United States, agreed and conceded, in argument and brief, that the right of presence was secured and protected by due process (under the Fifth Amendment); the Government urged only that the right should not be conceived equated, as well, to the right to counsel under the Sixth Amendment. Said the Government in argument there (244 U. S. at pp. 436-437):

> "The right of a defendant in a criminal case to be present at all stages of the trial . . . is a right which had long been secured to him at common law before the right to have counsel was granted to him and, therefore, is clearly not derived from the Sixth Amendment to the Constitution. Its derivation [is] from the early English common law [and, in America, and in Constitutional terms] from the 'due process' clause contained in the Fifth Amendment to the Constitution."
>
> —244 U. S. at pp. 436-437.

In *West v. Louisiana,* 194 U. S. 258, a ruling of a state court in a criminal cause permitting use of a deposition of a witness permanently outside the state boundaries, and beyond reach or power of process, was held not to offend due process, because predicated upon *necessity*—to wit, the impossibility of compelling appearance of the

witness—and because, in such premises, comparable in all respects to the ancient common law exceptions to right of presence permitting the use of depositions of witnesses who by the time of trial had become deceased or insane. Said this Court there, "The extension is not of such a fundamental character as to deprive the accused of due process of law." (194 U. S. at p. 263.)

Of similar significance see:

Howard v. Kentucky, 200 U. S. 164, 173-176;

Frank v. Mangum, 237 U. S. 309, 343-345;

Gaines v. Washington, 277 U. S. 81, 87.

Finally, in *Snyder v. Massachusetts,* 291 U. S. 97, this Court, while again reaffirming the decision in *Valdez v. United States, supra,* that right of presence does not extend to right to attend a mere passive view, stated in definitive manner, after lengthy review of the authorities, and of the scope and purpose of due process of law:

> "[Under] the Fourteenth Amendment . . ., the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by . . . absence . . . [Presence is indispensable to fair trial, when and to the extent that it] satisfies the test . . . basic and decisive, [that] it bears, or may fairly be assumed to bear, a relation, reasonably substantial, to . . . opportunity to defend. [To such extent it is a part of] the fundamental justice assured . . . by the Constitution of the United States."
>
> —*Snyder v. Massachusetts, supra,* 291 U. S. at pp. 107-108 and at p. 106, and again, at p. 108.

See also, subsequent to *Snyder v. Massachusetts,* and approving it:

Williams v. New York, 337 U. S. 241, 246;
Price v. Johnston, 334 U. S. 266, 285;
Johnson v. United States, 318 U. S. 189, 201.

Thus while no state has ever undertaken to deny or repudiate, in any substantive part, the mandatory, secured right of presence of an accused in any criminal cause, and hence no ruling upon the right under due process has been direct, the principle that Federal due process of law under the Fifth and Fourteenth Amendments, secures and protects in criminal causes the substance and core of right of presence is established Constitutional law, and never has this been disputed. That is, so basic is right of presence to fair accusation and trial in criminal causes that it is conceded it is basic, as well, to *due process,* and indispensable to Constitutional trial and judgment.

Depositions.

If, then, right of presence is basic to due process under the Constitution, and to fairness, in criminal causes, nothing is more plain than that that fundamental right so secured, probihits resort to "depositions," in the place of live, produced witnesses—except in rarest instances of *necessity,* bottomed upon impossibility of producing the affected witness live. That, indeed, is *fundamental to,* and a part of the *very purpose of,* the *right in its core.*

> "The primary object of the constitutional provision [securing right of presence and confrontation] was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the

accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief. [In the case of a deceased witness, the prior deposition of such witness may be used, but this is only by force of] the necessities of the case. * * * [Such depositions] are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice."

—*Mattox v. United States,* 156 U. S. 237, 242-244.

"This provision [right of presence] . . . intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witness as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross-examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of . . . cross-examination."

—*Dowdell v. United States,* 221 U. S. 325, 330.

"It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him, the admission of dying declarations is [merely] an exception which arises from the necessity of the case."

—*Kirby v. United States,* 174 U. S. 47, 61.

The use of depositions at pleasure, or for convenience only, as undertaken below, is inconsistent *utterly* with

the right of presence of a criminal accused. *Necessity* and *impossibility alone* can privilege use of depositions in the face of that fundamental command of fair criminal trial. (*Motes v. United States*, 178 U. S. 458; *Mattox v. United States, supra; Dowdell v. United States, supra; Kirby v. United States, supra.*)

> "The testimony for the people in criminal cases can only . . . be given by witnesses who are present in court. The defendant is entitled to be confronted with the witnesses against him; and if any of them be absent from the Commonwealth, so that their attendance cannot be compelled, or if they be dead, or have become incapacitated to give evidence, there is no mode by which their statements . . . can be used for his conviction. The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances; but they are far from numerous. If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or has left the State, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party. So, also, if a person is on trial for homicide, the declarations of the party whom he is charged with having killed, if made under the solemnity of a conviction that he was at the point of death, and relating to matters of fact concerning the homicide, which passed under his own observation, may be given in evidence against the accused . . ."
>
> —Cooley, "Constitutional Limitations" (8th Ed.), Vol. I, pp. 664-667.

In *Motes v. United States,* 178 U. S. 458, a deposition was admitted in a criminal trial of a witness who had departed from the jurisdiction of trial by negligence of the prosecuting officers. This Court, in reversing the conviction for violation of the right of presence and of confrontation, said:

> "We are of the opinion that the admission in evidence of Taylor's statement or deposition, taken at the examining trial, was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the Government. * * * In the present case there was not the slightest ground in the evidence to suppose that Taylor had absented himself from the trial at the instance, by the procurement or with the assent of either of the accused. Nor (if that were material) did his disappearance occur so long prior to his being called as a witness as to justify the conclusion that he had gone out of the State and was permanently beyond the jurisdiction of the Court. His absence, as already said, was plainly to be attributed to the negligence of the prosecution. The case is not within any of the recognized exceptions to the general rule prescribed in the Constitution. . . . We are unwilling to hold it to be consistent with the Constitutional requirement that an accused shall be confronted with witnesses against him, to permit the deposition or statement of an absent witness (taken at an examining trial) to be read at the final trial when it does not appear that the witness was absent by the suggestion, connivance or procurement of the accused, but does appear that

his absence was due to the negligence of the prosecution."

—*Motes v. United States, supra,* 178 U. S. at pp. 471-474.

Wigmore develops in detail that "necessity" and *only* such, will justify, in criminal causes, "dispens[ing] with the witness's personal presence for testifying," and says, respecting live and available witnesses as at bar, "No one has ever doubted that the *former testimony* of a witness cannot be used if the witness is *still available* for the purpose of testifying at the present trial." (Wigmore on Evidence (3d Ed.), Vol. V, pp. 146 and 191. Emphasis in original.)

Accord, as to the rule at common law, see:

Rex v. Crowther (1786), 1 T. R. 125, 127, 99 Eng. Rep. 1009, 1009-1011;

Rex v. Vipont (1761), 2 Burr 1163, 97 Eng. Rep. 767-769.

Had the instant case, then, been a trial for meanest misdemeanor, and certainly if for serious offense, the proceedings had below of *ex parte* trial—trial by "depositions," without the presence of petitioner at the substance of the hearing—would have been illegal, and, would have violated Constitutional due process of law and the requirements of *fair trial.*

II.

As in Criminal Causes, Due Process of Law Requires in Deportation Proceedings as at Bar Mandatory, Secured Right of Presence of the Accused.

If, as seen above, mandatory, secured right of presence is a precondition of due process in serious criminal causes because deemed indispensable there to security of fair trial and judgment, it is equally a requirement of due process in deportation proceedings of comparable quality and seriousness, as at bar. Identical considerations of Constitutional principle, and of public concernment for security of fair hearing, apply in each instance, and the differences in deportation in the name and formal purpose of society's act are without consequence upon the single and only issue—the need for, and the fair prerequisites, of safeguarded, secured *fair trial.*

The presence of the accused is required by due process in criminal causes because fair and accurate—and only such—application of society's criminal laws is a *public* requirement, not merely an individual interest. Fair judgment of others is sought by every member of society lest example be set or machinery created for unfair judgment of himself. Not magnanimity or generosity, but fear and self-interest lie at the requirement's roots. It is but a plain application of doing unto others as one would have only be done unto him.

Presence of the accused is a *central element* in the machinery of due process to achieve this purpose. No other single right affords society as great a measure of safeguard and security against miscarriage of, or malice in, the administration of justice as does the right of presence, the requirement that society's judgment be open, public, and to the face of the accused. Judgment with-

out such restraint is disquieting deeply, and opposed to public interest.

Indeed, so fundamentally is this so, that serious conflict has long existed whether, regardless of the rule as to lesser rights, the security of fair trial protected by the right of presence is a matter which can lie within the power of the individual, even by voluntary act, to waive. The historic statement of this Court in *Hopt v. Utah*, 110 U. S. 574, opposing power of waiver, strongly expresses the *deep public concernment* in the right of presence:

> "We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' I Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty, cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com.

11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

—*Hopt v. Utah, supra,* 110 U. S. at p. 579.

Quoted in full and approved in:

Schwab v. Berggren, 143 U. S. 442, 448-449;
Lewis v. United States, 146 U. S. 370, 374.

It is not important here that the portions of the excerpt from *Hopt v. Utah, supra,* relating to waiver, may now be in part reconsidered. (See *Patton v. United States,* 281 U. S. 276; *Adams v. McCann,* 317 U. S. 269.) Undiminished by any relaxation of law as to the breadth of right of waiver—which is in no way involved or reached in the proceedings at bar—is the deep condition of public interest expressed in *Hopt v. Utah* respecting full and inviolate security for the right of presence, as a safeguard of fair trial.

"The [rights of fair hearing] are not legal formalisms. . . . The *public conscience* must be satisfied that fairness dominates the administration of justice." (Emphasis added.)

—*Adams v. McCann,* 317 U. S. 269, 279.

The short of it is presence of the accused is affected deeply with public interest, and is of concern to "the pub-

lic conscience," because of its indispensable relation to *assuring fair hearing.*

It is by force of exactly this same relation that it is incorporated as a requirement of due process of law. In procedural areas, fair trial, and the machinery indispensable to *assuring* such, is the crux and *core* of due process.

The same purpose of fair hearing, and the same minimum Constitutional guarantee of procedural due process of law,* attend Federal deportation proceedings serious in quality as attend state criminal proceedings of like quality. The specific criminal-trial rights, *as such,* of the Fourth, Fifth and Sixth Amendments are not invokable in either such proceedings; only the minimums of justice secured by due process obtain. These, as will be seen, are extremely *few,* and are *basic utterly* to *fair trial;* in consequence they are as indispensable in the one class of proceedings as in the other, and for the same considerations and upon the same principles.

Thus, treating first of due process as a requirement in state criminal proceedings, petitioner does not urge here that due process as to state criminal causes makes applicable or subsumes the specific rights of criminal procedure secured in Federal criminal trials by the Fourth, Fifth and Sixth Amendments.* What are secured are not

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*In terms of Federal Constitutional right.

*This does not mean that forceful plea may not be made for broader construction of due process, either free from the limits here stated, or, as including all of the procedural limitations of the specific provisions in the Federal Bill of Rights, and as such; such positions have been most forcefully made, and have been accepted by a strong minority of this Court, in whole or part. However, the argument line of the brief herein makes it unnecessary to reach all or any of these issues or distinctions; the minimum positions assumed and stated in the text herein is here sufficient.

criminal rights, as such, upon analogy to or derivation from the Federal criminal-rights Amendments, but *due process rights* which, as to procedure, derive in source from the requirements of *fair trial and judgment*, and from the ultimate values of civilization and human dignity.

Thus, petitioner does not here dispute but that under *due process*, in state criminal causes, right to jury trial is *not* secured (*Maxwell v. Dow*, 176 U. S. 581; *Walker v. Sauvinet*, 92 U. S. 90), right to grand jury indictment is *not* secured (*Hurtado v. California*, 110 U. S. 516; *Gaines v. Washington*, 277 U. S. 81, 86), and right to immunity against self-incrimination is *not* secured. (*Twining v. New Jersey*, 211 U. S. 78; *Adamson v. California*, 332 U. S. 46.) Consistent with due process these may be abandoned, this Court has stated, because, "[Respecting them, it cannot be] maintain[ed] that a fair and enlightened system of justice would be impossible without them. . . . [They] might be lost, and justice still be done." (*Palko v. Connecticut*, 302 U. S. 319, 325.)

What *is* secured is the structure of trial "fundamental" to the substance of a "hearing" (*Powell v. Alabama*, 287 U. S. 45, 67-68), the rights required by "fundamental fairness" (*Lisenba v. California*, 314 U. S. 219, 236; *Gibbs v. Burke*, 337 U. S. 773, 781; *Betts v. Brady*, 316 U. S. 455, 473) and "essential to a fair hearing" (*De Meerleer v. Michigan*, 329 U. S. 663, 665; *Foster v. Illinois*, 332 U. S. 134, 139), the safeguards indispensable to "fair trial." (*Powell v. Alabama, supra*, 287 U. S. 45, 52; *Adamson v. California*, 332 U. S. 46, 53; *Lyons v. Oklahoma*, 322 U. S. 596, 605.)

> "It [is] the duty of the court having [criminal] cases in charge to see that [the accused are] denied no necessary incident of a fair trial. [If a state

acts otherwise it] infringes the due process clause of the Fourteenth Amendment."

—*Powell v. Alabama,* 287 U. S. 45, 52.

"Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent . . . [We] apply the Due Process Clause to its historic function [in] assuring appropriate procedure before liberty is curtailed or life is taken."

—*Watts v. Indiana,* 338 U. S. 49, 54-55.

"A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment."

—*Adamson v. California,* 332 U. S. 46, 53.

A survey of the *specifics* of the rights held by this Court to be mandatory by due process, and secured against violation, in state criminal proceedings, demonstrates at once the narrow, yet *crucial,* function of due process in preserving the *machinery of fair trial.* Thus, included within the irreducible requirements of the due process guarantee, are the following:

—Right to trial in a tribunal uncoerced by mob intimidation.

Moore v. Dempsey, 261 U. S. 86;
Frank v. Mangum, 237 U. S. 309.

—Right to trial by an impartial judge, unmarked by self-interest to convict.

Tumey v. Ohio, 273 U. S. 510.

—Right to trial by an impartial jury, representatively selected, and without discrimination, if a jury be had.

Hernandez v. Texas, 347 U. S. 475, 477;
Smith v. Texas, 311 U. S. 128, 130;
Glasser v. United States, 315 U. S. 60, 86.

—Right to public trial, and to immunity from trial *in camera.*

In re Oliver, 333 U. S. 257.

—Right to be advised of the charges laid, and right not to be convicted upon charges not thus declared.

Smith v. O'Grady, 312 U. S. 329, 334;
De Jonge v. Oregon, 299 U. S. 353, 362;
Powell v. Alabama, 287 U. S. 45, 68.

—Right to facilities for and time to subpoena or produce witnesses and evidence in defense.

Adams v. McCann, 317 U. S. 269, 279.

—Right to be represented by counsel of choice, or to act as own counsel, or, in capital cases, or where fair hearing requires, to have counsel appointed if the accused be unrepresented and unable fairly to represent himself.

Powell v. Alabama, 287 U. S. 45;
De Meerleer v. Michigan, 329 U. S. 663;
Uveges v. Pennsylvania, 335 U. S. 437;
Gibbs v. Burke, 337 U. S. 773.

—Right not to be convicted upon perjured testimony, knowingly suborned by the state.

Mooney v. Holohan, 294 U. S. 103;
Hawk v. Olson, 326 U. S. 271, 275.

—Right not to be convicted upon a confession or plea extorted by force or coercion, either mental or phy-

sical, or obtained by trick, fraud or false promise by the state.

Chambers v. Florida, 309 U. S. 227;
Leyra v. Denno, 347 U. S. 556;
Waley v. Johnston, 316 U. S. 101;
Ashcraft v. Tennessee, 322 U. S. 143.

—Right not to be put under violence in governmental process, nor to be subjected to cruel or inhuman punishment, nor to be twice punished for the same offense.

Rochin v. California, 342 U. S. 165;
Francis v. Resweber, 329 U. S. 459.

It will be seen, thus, that the requirements of due process affecting the conduct of state criminal trials, are, in every instance requirements *related indispensably to fair trial and judgment.* It will be evident, also, why mandatory and secured right of *presence* of the accused in criminal causes likewise is incorporated in the due process minimums. It, too, and in measure and manner identical to the other due process commands, is indispensable in function and in safeguard to fair judgment and trial.

So basic are these minimal rights of due process that on statement of their terms they are, in reality, self-establishing and self-sustaining. Thus, that violence and coercion cannot be due process is plain on merest assertion. So, too, that a trial by a self-interested judge is not, and cannot be, a fair trial. Equally, is it plain, that "trial" *in camera* is no true trial at all, and particularly so as to matters touching liberty or life.

"Certain safe-guards are essential to criminal justice. The court must be uncoerced, *Moore v. Dempsey,* 261 U. S. 86, and it must have no interest other

than the pursuit of justice, *Tumey v. Ohio,* 273 U. S. 510."

—*Adams v. McCann,* 317 U. S. 269, 275.

"[There must be] a charge fairly made and fairly tried in a public tribunal."

—*In re Oliver,* 333 U. S. 257, 278.

Not every state act is a due process act. It could not be suggested that the states might lawfully recreate "trial by ordeal" (*Brown v. Mississippi,* 297 U. S. 278, 285), nor determine criminal guilt "[by] an *ex parte* proceeding." (*Powell v. Alabama, supra,* 287 U. S. 45, 72.) There must be "a . . . trial," and in civilized terms. (*Powell v. Alabama, supra,* 287 U. S. at p. 52.)

In precisely kindred manner is right of presence of the accused *integral to fair criminal hearing.* Presence is the *natural,* and best, safeguard devisable against either malice or error in judgment, and the best guaranty of fair and full defense, both to individual and society, which can be had. It is inseparable from safeguarded hearing. It is, in this Court's short summarization, "[a necessary constituent requirement of] the fundamental justice assured . . . by the Constitution . . ." (*Snyder v. Massachusetts, supra,* 291 U. S. 97, 108), a right "scarcely less important to the accused than the right of trial itself." (*Diaz v. United States,* 223 U. S. 442, 455.)

But, if this be so, presence is a component of due process and of the "fundamental justice assured by the Constitution" as to *deportation proceedings* serious in quality, as at bar, *equally as in criminal inquiries.* In serious deportation causes—as at bar—placed in hazard for the affected individual is jeopardy of *banishment* for life,

with separation from family and homeland—perhaps after a lifetime of residence in the United States—with loss of "all that makes life worth living." (*Ng Fung Ho v. White,* 259 U. S. 276, 284.) Hence if it is *consequence* that makes *safeguarded* hearing required by due process, and under the standards of civilized, voluntary society, then like protected hearing is required in deportation causes as serious in quality as criminal hearings, notwithstanding the "form" or name to each assigned. The compelling individual and social *need* for fair judgment, and the issue of the requirements and machinery necessary to assure such, are in both cases *identical.*

There can be no question but that due process of procedural law *applies in* deportation causes, and particularly as to proceedings affecting long resident, lawfully admitted persons, as at bar. As to deportation proceedings in such premises, this Court, as long ago as *Yamataya v. Fisher* (1902), 189 U. S. 86, 100, declared:

> "[T]his court has never held, nor must we now be understood as holding, that administrative officers when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."
>
> —*Yamataya v. Fisher, supra,* 189 U. S. at p. 100.

Ever since that landmark declaration, it has been settled law, that, whatever may be the rule as to power of exclusion (*cf. Shaughnessy v. Mezei,* 345 U. S. 206; *Knauff v. Shaughnessy,* 338 U. S. 537; *cf. Bridges v. Wixon,* 326 U. S. 135, 154), *as to deportation proceed-*

ings, and particularly where affecting lawfully admitted, long resident aliens, *the requirements of due process of procedure must be complied with,* and that "[such a person] may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." (*Shaughnessy v. Mezei, supra,* 345 U. S. 206, 212; *Kwong Hai Chew v. Colding,* 344 U. S. 590, 595-598; *Wong Yan Sung v. McGrath,* 339 U. S. 33, 49; *Heikkila v. Barber,* 345 U. S. 229, 234; *Johnson v. Eisentrager,* 339 U. S. 763, 770-771; *Bridges v. Wixon,* 326 U. S. 135, 153-154; *Kessler v. Strecker,* 307 U. S. 22, 34; *Galvan v. Press,* 347 U. S. 522, 531; *Kwock Jan Fat v. White,* 253 U. S. 454, 457-458; *Carlson v. Landon,* 342 U. S. 524, 537; *United States ex rel. Vajtauer v. Commissioner,* 273 U. S. 103, 106; *United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149, 156-157; *Tang Tun v. Edsell,* 223 U. S. 673, 681-682.)

In proceedings affecting deportation of lawfully resident aliens, inquiry and hearing "full and fair" (*Johnson v. Eisentrager, supra,* 339 U. S. at 771; *United States ex rel. Vajtauer v. Commissioner, supra,* 273 U. S. at 106), is "required by the Constitution" (*Heikkila v. Barber, supra,* 345 U. S. at 235), as a matter of "paramount law" (*Carlson v. Landon, supra,* 342 U. S. at 537; *Fong Yue Ting v. United States,* 149 U. S. 698, 713). "[M]eticulous care" must be exercised in such proceedings to render certain that there be observed there "the essential standards of fairness." (*Bridges v. Wixon,* 326 U. S. 135, 154.)

> "[W]ithout such hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law

derives from the same source as Congress' power to legislate. . . ."

—*Wong Yang Sung v. McGrath, supra,* 339 U. S. at p. 49.

"It is well established that if an alien is a lawful permanent resident of the United States . . . he is a person within the protection of the Fifth Amendment . . . [and] not even Congress may expel him without allowing him a fair opportunity to be heard."

—*Kwong Hai Chew v. Colding, supra,* 344 U. S. at pp. 596-598.

It is to be emphasized and underlined that petitioner seeks right of presence in deportation as a *due process right*—NOT as a matter of right derivable from the *Federal Criminal trial right provisions* of the Fifth and Sixth Amendments. It is the Fifth Amendment's command, "No person . . . shall be deprived of life, liberty or property, without due process of law," which petitioner invokes—*not* the provisions in that Amendment and in the Sixth Amendment securing specific rights of procedure in Federal *criminal* proceedings as such, as the provisions that "In all [Federal] criminal proceedings" there shall be secured right of jury trial, public hearing, right of counsel and confrontation, the privilege against self-incrimination, and other rights. While some of these rights are also components of due process, not all of them are, and petitioner invokes none of them as direct sources of right in deportation. Petitioner presses, solely, *due process of law.* The significance of the Federal criminal trial rights, in the instant case, and the greater significance of the due process cases reviewing *state* criminal convictions and hearings, is as such rights, or such due

process decisions, may serve as *due process measures* for the procedural content of due process in serious deportation proceedings.

By reason of the distinction just stated the instant case is not within the principle of those prior decisions of this Court which have held that deportation proceedings are not within the scope and protection of any of the strictly *criminal rights* provisions of the Constitution. Not involved, therefore, at bar, nor applicable, are the statements or decisions of this Court, for example, that right of jury trial is not secured in deportation causes (*Carlson v. Landon,* 342 U. S. 524, 537), or that the privilege against self-incrimination does not operate there (*United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149; *United States v. ex rel. Vajtauer v. Commissioner,* 273 U. S. 103), or that the prohibition against *ex post facto* laws is not applicable there (*Bugajewitz v. Adams,* 228 U. S. 585; *Harisiades v. Shaughnessy,* 342 U. S. 580), nor the prohibition against Criminal Bills of Attainder (*Harisiades v. Shaughnessy, supra; Galvan v. Press,* 347 U. S. 522).

None of these cases has reach or application to the issue here—due process of procedure. Notwithstanding, thus, that the jury trial and self-incrimination Constitutional clauses do not obtain in deportation, *the requirements of due process remain.* Indeed, as previously seen, as a due process matter, neither jury trial nor right against self-incrimination are secured even in directly criminal causes, and state legislatures may alter those matters, or abolish them, without offending the Federal requirement of due process of fair procedure. (*Maxwell v. Dow, supra,* 176 U. S. 581; *Twining v. New Jersey, supra,* 211 U. S. 78; *Adamson v. California, supra,* 332 U. S. 46.) This

because, in this Court's words, as noted earlier, respecting such rights, "[it cannot be] maintain[ed] that a fair and enlightened system of justice would be impossible without them . . . [They] might be lost and justice still be done." (*Palko v. Connecticut, supra,* 302 U. S. 319, 325.) *But* it is otherwise with the indispensables of fair trial comprising commands made mandatory by due process, including right of presence.

If in serious deportation proceedings due process of procedure is required to be observed, as previously seen, and if as to state criminal trials, in the words of this Court (*Snyder v. Massachusetts, supra,* 291 U. S. 97, 106), mandatory right of presence is required by due process as to all portions of trial "bear[ing] a relation, reasonably substantial, to . . . opportunity to defend," and this because such right is in such measure "[necessary to] the fundamental justice assured . . . by the Constitution" (*id.* at p. 108), then the conclusion follows that *equally* in *deportation* causes too, where there are affected serious issues of liberty, or life, "the presence of [the] defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by . . . absence . . ." (*id.* at p. 108).

That is petitioner's thesis.

It is without consequence, utterly, for the issue here, that deportation has been classed "civil," and not "criminal," in name and form in other contexts, and for purposes of measuring the reach of Consitutional securities limited in their terms to application only in criminal areas, and as such. What counts in *due process* is *substance,* not *form* (*Simon v. Craft,* 182 U. S. 427, 436; *Foster v. Illinois,* 332 U. S. 134, 137; *Avery v. Alabama,* 308

U. S. 444, 446; *Palko v. Connecticut,* 302 U. S. 319, 327; *Near v. Minnesota,* 283 U. S. 697, 708; *Cummings v. Missouri,* 4 Wall. (71 U. S.) 277, 325), and the requirements of fair, seemly and sufficient hearing, under due process, vary with the measure and quality of the jeopardy which the hearing places in balance, and with whether matters of civil property only, or matters of liberty or life, are entailed—not with the name alone of the affected proceedings, nor even with the stated motive or purpose of society in undertaking the same.

Fair hearing is required in full form by due process, under reason, in those proceedings where there are affected most serious jeopardies, and especially jeopardies to personal liberty or life. Serious deportation causes surpass many criminal inquiries in the jeopardies involved, and may entail jeopardy even to life, and always place in balance banishment for life, and exile, a punishment no crime presently known to our law entails.

Characterizing the consequences of serious deportation causes, this Court has said that deportation "can be the equivalent of banishment or exile" (*Delgadillo v. Carmichael,* 332 U. S. 388, 391; *Fong Haw Tan v. Phelan,* 333 U. S. 6, 10), and may result in loss "of all that makes life worth living." (*Bridges v. Wixon,* 326 U. S. 135, 147; *Ng Fung Ho v. White,* 259 U. S. 276, 284.) Such proceedings "involve issues basic to human liberty and happiness, and, in the present upheavals in lands to which aliens may be returned [may entail jeopardy] perhaps to life itself." (*Wong Yang Sung v. McGrath,* 339 U. S. 33, 50.) "The stakes are indeed high and momentous for the alien. . . ." (*Delgadillo v. Carmichael, supra,* 332 U. S. 388, 391.) And, particularly is all this true as to an alien, as at bar, whose "roots

[are] deeply fixed in this land" (*Bridges v. Wixon, supra,* 326 U. S. at p. 154), and who has become "[a] part of the American community." (*Galvan v. Press,* 347 U. S. 522, 530.)

Because of its grave, pain-inflicting qualities, this Court has many times equated deportations to the criminal area of law for purposes of measuring allocable rights, and their scope, in areas of law parallel entirely to the measuring at bar of due process fair hearing—and especially so in the field of procedural law and within the territory affected by due process.

Thus this Court has applied a presumption of defense approaching closely the criminal law presumption of innocence in deportation causes (*Kwock Jan Fat v. White,* 253 U. S. 454, 464) and in denaturalization causes (*Baumgartner v. United States,* 322 U. S. 665; *Schneiderman v. United States,* 320 U. S. 118), an important consideration in the latter ruling being that denaturalization, if had, creates vulnerability to deportation.

Similarly, this Court has held applicable in deportation causes the void-for-vagueness test as to constitutionality of statutes, deriving in origin from criminal law causes (*Jordan v. De George,* 341 U. S. 223, 231), as well as the principle of strict and narrow construction of legislation. (*Delgadillo v. Carmichael,* 332 U. S. 388; *Fong Haw Tan v. Phelan,* 333 U. S. 6, 10.)

Similarly, in *Schneiderman v. United States,* 320 U. S. 118, this Court applied in a denaturalization case the principle of confining judgments strictly to the scope of the charges laid. Said this Court, aptly, there, at page 160:

"As we said in *De Jonge v. Oregon,* 'Conviction upon a charge not made would be sheer denial of due process.' 299 U. S. 353, 362. A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently, we think the Government should be limited, as in a criminal proceeding, to the matters charged in [the] complaint."

—*Schneiderman v. United States, supra,* 320 U. S. at p. 160.

In *Bridges v. Wixon, supra,* 326 U. S. 135, 153-154, this Court disallowed as evidence in a deportation cause the prior inconsistent statement of a witness uttered prior to the proceedings and without confrontation, cross-examination or oath. Said this Court there in pointed language:

"[They might] be admissible for purpose of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence. [Citing cases.] So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded. There has been some relaxation of the rule in alien *exclusion* cases. . . . But we are dealing here with deportation of aliens whose roots may have become . . . deeply fixed in this land. . . . Here the liberty of an individual is at stake."

—*Bridges v. Wixon, supra,* 326 U. S. at pp. 153-154, emphasis in the original.

Thus in many premises comparable to the issues framed at bar this Court has recognized that in measuring rights of hearing, issues of due process, and questions as to the fair rules of evidence, the same full safeguards and se-

curities for liberty and fair trial are required, in principle and under the Constitution, in serious deportation causes as in criminal causes, because in both "the liberty of an individual is at stake."

Right of presence is comparable in all respects, and is, indeed, even more *fundamentally* linked to fairness of hearing, and therefore to equality of right and safeguard, than the rights treated of in the listed cases. If any right is secured by due process fair trial, right of presence must be, for none is more basic.

Of course, due process of law, even as to the minimals of fair trial, must, as *all* human law, accommodate to compulsion of *necessity*. (*Moyer v. Peabody*, 212 U. S. 78; *Mattox v. United States*, 156 U. S. 237.) Thus *temporary* restraint may be had, in premises of *emergency*, without charge, let alone hearing, if reasonably necessary to prevent civil violence. (*Moyer v. Peabody, supra; cf. In re Gannon*, 16 R. I. 537, 538-541.) Similarly, even as to right of presence the necessities of death, incapacitating illness or insanity are recognized exceptions to the right, and to due process. (*Mattox v. United States, supra; West v. Louisiana*, 194 U. S. 258.) But respecting liberty, or life, and the fundamental procedural rights necessary to safely secure those greatest of human values, due process makes compromises, *only* where founded upon and compelled by *necessity*, nothing less. (*Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 114 *et seq.; Kirby v. United States*, 174 U. S. 47, 61; *Motes v. United States*, 178 U. S. 458; *Mattox v. United States*, 156 U. S. 237,

242-243; *Dowdell v. United States,* 221 U. S. 325, 329 *et seq.; West v. Louisiana,* 194 U. S. 258; *Cooke v. United States,* 267 U. S. 517, 636-637; *In re Oliver,* 333 U. S. 257, 274; *Anderson v. Dunn,* 6 Wheat. (19 U. S.) 204, 231; *Offutt v. United States,* 348 U. S. (Adv. Ops.) 11, 14; *Ownbey v. Morgan,* 256 U. S. 94, 102-104; *Endicott Co. v. Encyclopedia Press,* 266 U. S. 285, 288-289.)

Below, right of presence was dispensed with upon considerations of government convenience only, and without compulsion whatever of necessity. Due process fair trial ("due process in the primary sense"—*Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673, 681) may not be thus set aside. Its roots derive from "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Snyder v. Massachusetts,* 291 U. S. 97, 105.) It is bottomed on the principle that under our Constitution "respect for the dignity of all men is central." (*McNabb v. United States,* 318 U. S. 332, 343.)

Respecting liberty, or life, and the fundamental procedural rights necessary to safely secure such, the premise of due process fair trial is that safeguarded, protected hearing shall be compromised or displaced only if compelled by *necessity,* never for convience alone, or other lesser value, matter or thing.

III.

Other Non-criminal Proceedings Seriously Affecting Liberty, Body or Life, Other Than Deportation, Confirm That—Where Such Jeopardies Are Issued—Due Process Requires Mandatory Right of Presence as a Condition of Fair Judgment and Trial.

Two fields of law closely parallel to deportation in the qualities of moment at bar—serious interference with liberty, body or life—well illustrate and confirm that mandatory, secured right of presence is required indispensably by due process in hearings or proceedings affecting such jeopardies—notwithstanding that the acts undertaken by society may be classed "civil," rather than "criminal," or that the purpose of society may be other than to punish. These are (1) insanity proceedings, and (2) compulsory asexualization hearings.

Insanity Proceedings.

Although concededly "civil" in character, and not purposed at "punishment," insanity proceedings are universally held to require, as a mandatory condition of Constitutional due process of law, full rights of fair hearing and judgment as conditions of lawful commitment, including secured, mandatory right of presence—save only in exceptions created by *necessity*.

Where mental illness makes presence by the affected individual unsafe to others, or dangerous or injurious to himself, the law, by necessity, substitutes (or adds) rights of contest, hearing and attendance in other persons than the accused, as in chosen or appointed counsel, in family, friends, or legal guardian. Further, if rights of hearing, including right of attendance, are extended to the affected person but are not desired by him to be exercised, and

are not availed of, they may be waived; their exercise need not be compelled.

Absent these exceptions, however, the decisions of this Court and of all state courts, concur with unanimity that insanity proceedings, because equal entirely in severity of consequence to proceedings criminal in purpose and name, require rights of fair trial equal in safeguard, and that in consequence there must be extended to the accused, save as modified by necessity or incapacity, all of the substantive rights of hearing and defense secured by due process in criminal causes, including full and safeguarded right of presence, and subsumed within it, right of confrontation, cross-examination, and right to counsel.

There is difference in the authorities as to whether hearing must precede permanent order of commitment, or may follow such, as by habeas corpus or appeal, and there is difference, too, as to whether notice, presence and other rights secured to counsel, or to family, or through an appointed guardian, can or should be alternative to such rights in the individual himself, where such person is conceived incapacitated from acting or judging for himself. But all courts in all circumstances agree that notwithstanding that insanity proceedings are "civil" in name, and notwithstanding that they are curative rather than punitive in purpose, nonetheless, because such proceedings affect liberty equally and indistinguishably with criminal causes, due process requires for such proceedings like process to process minimal to fairness in criminal proceedings, and requires safeguard of all of the indispensable rights of safeguarded fair trial, including secured right of presence.

Simon v. Craft, 182 U. S. 427;
Chaloner v. Sherman, 242 U. S. 455;

In re Moynihan, 332 Mo. 1022, 62 S. W. 2d 410;
44 C. J. S. 78;
28 Am. Jur. 674-679;
Ex parte Allen, 82 Vt. 365, 73 Atl. 1078;
Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270, 275-277;
Matter of Lambert, 134 Cal. 626, 632-633, 66 Pac. 851;
Shields v. Shields (D. C. W. D. Mo.) 26 F. Supp. 211, 215;
In re Gannon, 16 R. I. 537, 538-541, 18 Atl. 159;
Barry v. Hall (U. S. C. A. D. C.), 98 F. 2d 222, 225-226;
Appeal of Sleeper, 147 Me. 302, 87 A. 2d 115.

True, right of presence is not often issued *eo nomine* in such proceed , distinct and separated from the deeper reaching rights of "notice," "opportunity to defend," and "right to be heard," but in all decisions touching the subject, or area, of presence, directly or indirectly, such right, explicitly or implicitly, is either expressed, or accepted without contest, as indispensable in such proceedings to safeguard of fair trial, and to due process of law.

The decision of this Court in *Simon v. Craft,* 182 U. S. 427, is basic as to security of presence by Constitutional requirement in such proceedings. There an insanity commitment of one Jetta Simon, and the appointment of a guardian, was challenged collaterally, and as a matter of real property chain of title, upon a claim that the proceedings in entirety were void on their face because the sheriff's return showed the accused incompetent had been taken in custody and had not been produced at the hear-

ing. The sheriff's return, as the state law in such premises required, certified and averred the claimed incompetent had not been produced at the hearing because to do so "[would have been] inconsistent with [her] health or safety." (182 U. S. at p. 435, n. 1.) This Court, assuming plainly, and as first premise, that in insanity proceedings fair trial and due process in normal premises would require absolute security of presence of the person affected, sustained the proceedings challenged there as an exception, an exception caused and excused by *necessity*—danger to health, or to safety. Observing pointedly that the truth and honesty of the sheriff's certification was in no manner controverted or challenged, this Court concluded that confinement in the premises there was to be interpreted as "to enforce . . . attendance of the alleged *non compos* rather than to authorize a restraint," declaring specifically it was the "absolute duty" of the sheriff in the premises to "bring . . . the person before the court [for the insanity proceedings]" if "in a fit condition to attend." Said this Court, in part:

> "The invalidity of the proceedings in the inquisition of lunacy . . . is in substance predicated on the contention that the writ directed to the sheriff authorized that official to determine whether it was consistent with the health and safety of Mrs. Simon to be present at the trial of the question of her sanity; that the sheriff decided this question against her, and she was detained in custody and not allowed to be present at the hearing of the inquisition. The latter claim, however, is founded [only] upon the return endorsed by the sheriff on the writ directed to him. At the trial below there was no offer to prove, by any form of evidence, that Mrs. Simon was in fact of sound mind when the proceedings in lunacy were

instituted, or that she desired to attend, and was prevented from attending the hearing, or was refused opportunity to consult with and employ counsel to represent her. The entire case is thus based solely on the inferences which are deduced, as stated, from the face of the return of the sheriff. * * * The contention . . . urged is . . . that the return of the sheriff conclusively established that Mrs. Simon was taken into custody and was hence prevented by the sheriff from attending the inquest or defending through counsel if she wished to do so in consequence of the notice which she received. It seems, however, manifest—as it is fairly to be inferred the state court interpreted the statute—that the purpose in the command of the writ, 'to take the person alleged to be of unsound mind, and, if consistent with his health or safety, have him present at the place of trial,' was to enforce the attendance of the alleged *non compos,* rather than to authorize a restraint upon the attendance of such person at the hearing. In other words, that the detention authorized was simply such as would be necessary to enable the sheriff to perform the absolute duty imposed upon him by law of bringing the person before the court, if in the judgment of that officer such person was in fit condition to attend, and hence it cannot be presumed, in the absence of all proof or allegation to that effect, that the sheriff in the discharge of his duty, after serving the writ upon the alleged lunatic, exerted his power of detention for the purpose of preventing her attendance at the hearing, or of restraining her from availing herself of any and every opportunity to defend which she might desire to resort to, or which she was capable of exerting."

—*Simon v. Craft, supra,* 182 U. S. at pp. 433-436.

In *Minnesota ex rel. Pearson v. Probate Court*, 309 U. S. 270, this Court, although declining to enjoin *in limine* the insanity proceedings put in issue there* upon either substantive or procedural ground of attack, took express note of "the special importance" of maintaining "the basic interests of liberty" in such cases, and of safeguarding there "the fundamental rights embraced in the conception of [procedural] due process." Also, note was taken, and specifically, that the proceedings affected there provided "for hearing and for examination of the person proceeded against," *i. e.*, for secured attendance and presence. Said this Court, there:

> "There remains the question whether, apart from definition and classification, the procedure authorized by the statute adequately safeguards the fundamental rights embraced in the conception of due process. In this relation it is important to note that appellant has challenged the proceedings *in limine* by seeking to prevent the probate judge from entertaining it. To support such a challenge, the statute in its procedural aspect must be found to be invalid on its face and not by reason of some particular application inconsistent with due process . . . As we have seen [the procedure established provides that] the facts must first be submitted to the county attorney who must satisfy himself that good cause exists. He then draws a petition which must be 'executed by a person having knowledge of the facts.' The probate judge must set the matter for hearing and for examination of the person proceeded against. Provision is made for his representation by counsel and for compelling the production of witnesses in his

*(Confinement proceedings affecting persons of "psychopathic personality.")

behalf. * * * We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and impartial in appearance' may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings. But we have no occasion to consider such abuses here, for none have occurred. The applicable statutes are not patently defective in any vital respect and we should not assume, in advance of a decision by the state court, that they should be construed so as to deprive appellant of the due process to which he is entitled under the Federal Constitution."

—*Minnesota ex rel. Pearson v. Probate Court, supra,* 309 U. S. at pp. 275-277.

Again, in *Chaloner v. Sherman,* 242 U. S. 455, this Court again upheld an insanity commitment, and appointment of a guardian, as satisfying due process of law, where it was made to appear (and *only* because it was made so to appear) that while the affected person was not present at the hearing, he had been given notice and opportunity to attend, and had voluntarily determined not to appear,* and that, additionally, according to credible medical testimony, accepted at the hearing, to have compelled his appearance against his will would have

*The individual affected by the proceedings avowedly refused to attend, because he feared the judgment would be adverse to him if he did appear; this appears clearly in the report in the court below, *Chaloner v. Sherman* (C. C. A. 2d 1914), 215 Fed. 867, 872.

been injurious to his mental health.* The commitment was sustained as meeting the necessities and requirements of due process in such stated circumstances. Said this Court:

> "At each stage in the proceeding leading up to the order of June 23, he was personally served . . . with notice and was given an opportunity to be heard. Thus he had notice of the motion, on May 19, to appoint the *commission de lunatica inquirendo;* of the inquisition of June 12th; and of the motion to confirm the inquisition and for appointment of a committee on June 23. Such notice and opportunity to be heard at the inquisition was required by the law of New York though not expressly recited in the statute; *Matter of Blewitt,* 131 N. Y. 541; *Gribley v. College of St. Francis Xavier,* 137 N. Y. 327; *Matter of Fox,* 138 App. Div. 43. Plaintiff was physically able to be present at this hearing. But he did not appear, did not send anyone to represent him, nor ask for an adjournment. At the inquisition the commission and the jury, after hearing witnesses, concluded that his attendance was unnecessary and did not require him to attend. There was evidence that his enforced attendance would be detrimental to his mental health."
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> —*Chaloner v. Sherman, supra,* 242 U. S. at pp. 459-461.

The leading state case is *In re Moynihan,* 332 Mo. 1022, 62 S. W. 2d 410, 91 A. L. R. 74. Presence is declared indispensable to due process in insanity proceedings there "even [if requiring] the precaution of an attendant." It is developed there—with pointed parallel to the premises of deportation at bar—that full require-

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* (". . . would do him harm mentally."—215 Fed. at p. 870.)

ments of fair hearing and trial, including right of presence, are required in insanity commitments, notwithstanding that right of jury trial does not obtain there since such proceedings are not strictly "criminal," and notwithstanding that the purpose of society in such proceedings is curative, and not to punish. The Missouri Court, on these scores, stated in that decision:

> "Petitioner says these sections violate the Fifth and Fourteenth Amendments to the Constitution of the United States, contending that authorizing the probate court to find a person insane and to appoint a guardian of his person and property, without having him present and without the verdict of a jury, deprives him of his liberty and property without due process of law. [But] due process of law [does not] require a trial by jury, even in all criminal cases. * * * Since an insanity hearing is a civil case . . . it would seem at least that due process of law does not require that there be a jury trial, whether demanded or not, and we so hold. * * * However, even though an insanity proceeding is primarily for the benefit of the person suspected of being insane, nevertheless depriving a person of his liberty and his freedom to do as he sees fit with his property and putting him under the stigma of irrationalism is such a serious matter that there should be, for the person whose sanity is inquired into, every proper safeguard. As this Court said in the *Searcy* and *Shanklin* cases, declaring unconstitutional the section authorizing such hearings without notice: 'If he be a raving maniac, he can appear by attorney or through his friends and see that a proper person is appointed guardian, or that a proper care is given to his property and to his person. In addition, what if the person was not really insane at

all, and without notice was adjudged insane and confined in an asylum, and management of his property given to another? In such contingency the propriety of notice would be manifest, and, if given, would defeat the recovery of a judgment. . . . [The] Marquis case (85 Mo. 615) is an instance in our own reports where a citizen was so adjudged insane without notice, and at the very next term of court appeared and proved that he was not, and never was, insane. But however the past experience may have been, the fact remains that the possibility of such an outrage being perpetrated is afforded by the statutory provisions referred to; and it is the duty of the courts, whenever the question arises, to prevent the happening of such a wrong, by declaring those provisions to be unconstitutional.' * * * [In consequence, under valid and constitutional procedure], if the person confined desires . . . to attend the hearing . . ., he has that constitutional right, and it would be the duty of the superintendent to allow it, even with the precaution of an attendant, if he thought that necessary."

—*In re Moynihan, supra*, 332 Mo. at pp. 1028-1039.

In *Matter of Lambert*, 134 Cal. 626, 632-633, 66 Pac. 851, the Supreme Court of California, respecting the necessity for according due process in insanity confinements, observed:

"An order for the commitment of a person to an insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle in English jurisprudence that before any judgment can be pronounced against a person, there must have been a trial of the issue upon which the judgment is given. Under the laws of this state, a guard-

ian of the person or the estate of an insane person cannot be appointed without giving him notice of the application therefor. (Code Civ. Proc., sec. 1763); nor can a judgment for so small a sum as five dollars be rendered against him unless he has been served with a summons in the action. (Code Civ. Proc., sec. 411.) Much more is there reason for giving him notice of an application to deprive him of his personal liberty."

—*Matter of Lambert, supra,* 134 Cal. at pp. 632-633.

In 44 C. J. S. 78, respecting right of presence in insanity proceedings, it is declared:

"The alleged lunatic has a right to be present in the hearing or trial; and generally it is necessary that he be present, except where he has been duly notified, or in certain cases in which his presence may be dispensed with, as where it might injure his health or endanger his safety, or where he refuses to submit himself to the court's jurisdiction.

"As appears *infra* section 27, the denial of the right to be present may be sufficient cause for setting aside the inquisition, and a finding of insanity without the presence of the lunatic, as required by statute, has been declared void; but it has also been held that this irregularity will not *per se* entirely avoid the inquisition, and that a proceeding without the presence of the alleged lunatic is only voidable and liable to attack by him, but not void as to other parties, so as to be subject to collateral attack."

Accord:

28 Am. Jur. 674-679.

Respecting the right, and the significance, of presence of the accused in insanity proceedings, to insure fair

judgment, the Vermont Supreme Court, in *Ex parte Allen*, 82 Vt. 365, 373, 73 Atl. 1078, stated:

> "'It is a fundamental principle of justice, essential to every free government, that every citizen shall be maintained in the enjoyment of his liberty and property unless he has forfeited them by the standing laws of the community, and has had opportunity to answer such charges as, according to those laws, will justify a forfeiture or suspension of them. And whenever the Legislature has provided that, on account of crime or misfortune, the public safety or convenience demands a suspension of these essential rights of the individual, and has provided a judicial process, by which the fact shall be ascertained, it is to be understood as required that the tribunal to which is committed the duty of inquiring and determining shall give opportunity to the subject to be heard in support of his innocence or his capacity.' In *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623, it is said: 'Often if given notice he (the alleged insane person) will be prompt to attend, and in his person be the unanswerable witness to his sanity; often, if not given notice, those interested in using or robbing him of his property will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice. . . .'"

Accord:

> "The record shows affirmatively that petitioner was not present at the hearing or inquiry held by the Probate Court. The Missouri Statute requires that he be notified of the hearing *and of his right to be present*. . . . That Statute (Sec. 450) without the requirement of notice had been held unconstitutional under the due process clause of both the Federal and Missouri Constitutions. (*Hunt v. Searcy*,

167 Mo. 158, 67 S. W. 206, 214; *Shanklin v. Boyce*, 275 Mo. 5, 204 S. W. 187.) The Missouri Supreme Court held in *Hunt v. Scarcy, supra*, that a judgment of insanity, without notice to the person adjudged insane and without his appearance, was void, whether the Statute required notice or not because under such conditions due process was absent. The judgment of the Probate Court does not show why petitioner was not present at the hearing. The evidence in support of the present application does. The reason was not that petitioner was violently insane but because he was confined in the Asylum at the order of the Probate Court and the Guardian and not permitted to be present. If jurisdiction does not exist when a person is not notified that he is entitled to be present at the inquiry into his sanity, then with much greater reason is jurisdiction as well as due process lacking when he is notified but not permitted to do what the notice tells him he has a right to do."

—*Shields v. Shields* (D. C. W. D. Mo.), 26 F. Supp. 211, 215.

Discussing insanity confinement, right of presence, and the requirements of due process hearing, the Supreme Court of Rhode Island, in *In re Gannon*, 16 R. I. 537, 538-541, 18 Atl. 159, stated:

"The contention is that sections 11 and 12 of chapter 74 deprive the persons committed under them of their liberty without due process of law. . . . The only safeguard against an improper commitment [affiorded under the statutory sections attacked] is the certificate of two practicing physicians of good standing, a certificate which may be given entirely *ex parte*. We are not prepared to say that even so the sections would be void, if they were intended

simply for temporary detention, preliminary to or pending a proper judicial inquiry. The right of personal liberty is to be reasonably understood, and there are many restraints which are allowed as consistent with it. Thus the passengers and crew of a ship are liable to restraints other than those which are merely incident to their position on shipboard. They must submit to such restraints as are necessary for due discipline and the general safety. . . . Children may be confined for instruction or punishment. Sick people, in the delirium of fever, may be held on their beds by force, and lunatics, who are dangerous to themselves or others, may be shut up in the dangerous periods of their lunacy. [But, in the case at bar, permanent, continuing commitment is provided, and a commission of inquiry to conduct a hearing] is to be appointed, not at the instance of the person confined, but only on application by some other person, who, unless applying under section 29, is required, before the appointment, to pay or secure the payment of the expenses, which are sometimes onerous. And, moreover, it is provided in express terms that no notice of the pendency of the inquiry before the commission shall be served on the person confined, and that such person shall not have the right to confer with counsel, to produce evidence, or to be present at the inquisition. [In consequence the statutory sections] deprive the persons confined under them of . . . liberty without due process of law."

—*In re Gannon*, 16 R. I. at pp. 538-541.

Accord:

Appeal of Sleeper, 147 Me. 302, 87 A. 2d 115.

Many cases note—in a manner entirely parallel to deportation issues as at bar—that the mere circumstance

that right of jury trial may not obtain in insanity proceedings, because such are not strictly "criminal," does not gainsay that full requirement of procedural due process, and of fair trial, obtains. Jury trial is not indispensable to due process even in criminal causes. However, the requirements of due process of procedure, and of fair trial, must be met.

> "The appellant's confinement in Saint Elizabeth's under the Treasury Department letter until the time of the order of remand on the writ of habeas corpus of January 26, 1937, was illegal. Insanity is not a crime and therefore the constitutional guaranty of jury trial is not applicable; nevertheless, confinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail. The Fifth Amendment is applicable in the District of Columbia, *Sims v. Rives*, 1936, 66 App. D. C. 24, 31, 84 F. 2d 871, 878, and cases cited; and it guarantees that no person shall be deprived of liberty without due process of law."
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> —*Barry v. Hall* (U. S. C. A. D. C.), 98 F. 2d 222, 225-226.

Asexualization Proceedings.

Similar import for the question at bar is to be found in the law affecting proceedings for compulsory sterilization or asexualization. Statutes providing for such compulsory operations have now been adopted in more than a majority of the states, on the initial example of Indiana in 1907.*

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*Report of the Committee of the American Neuralogical Association for the Investigation of Eugenical Sterilization, "Eugenical Sterilization" (1936) Chapter II., pp. 7-21; James E. Hughes, "Eugenic Sterilization in the United States" (1940), supplement No. 162 to the Public Health Reports, the United States Public Health Service; Note, "Sterilization Laws; Their Constitutionality" (1937), 17 B. U. L. Rev. 246, 247-249.

Where sterilization laws are punitive in object and purpose, and a very few are,* serious doubt exists even as to substantive constitutionality, let alone as to mandatory Constitutional requirement for due process fair hearing in procedure. (*Davis v. Berry* (D. C. S. D. Ia.), 16 Fed. 413; *Mickle v. Henrichs* (D. C. D. Nev.), 262 Fed. 687; *cf. Skinner v. Oklahoma,* 316 U. S. 535.) But, as to enactments purposed at eugenical sterilization of defectives, it is now well established that such enactments are not punitive in character, but are civil, and hence are not prohibited as "cruel or unusual" criminal punishment, and that, if reasonable in substantive terms, such statutes are constitutional as matters of substantive law. (*Buck v. Bell,* 274 U. S. 200; *Smith v. Command,* 231 Mich. 409, 416, 204 N. W. 140, 142, observing: "There is no element of punishment involved in the sterilization of feebleminded persons. In this respect it is analogous to compulsory vaccination. Both are non-punitive.")

Nonetheless, though "civil" and non-punitive, asexualization proceedings, under established law, must faithfully

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*Note, "Sterilization Laws; Their Constitutionality," *supra,* 17 B. U. L. Rev. 246, 247. In the Report of the Committee of the American Neurological Association, *supra,* "Eugenical Sterilization," p. 1, it is stated: "The most primitive form of sterilization is undoubtedly castration. The impulse to inflict injury upon an enemy's genitalia as a measure of punishment and insult is a deeply rooted one in the human race, which finds expression at times among the most civilized modern nations, as well as among savages. When Heloise's uncle castrated Abelard, it was certainly with no eugenic purpose in mind, but to punish and show contempt for the man who had betrayed the honor of her family. There have been famous cases in the history of every community when such revenge has been taken, occasionally on a wholesale scale. The suspicion of a sadistic motive must always arise when genitalectomy is advocated for any group of physically healthy people, as, for example, in Turkey and in occasional communities of the Western World where castration of certain classes of criminals has been prescribed by law."

afford fairest hearing in procedure, as a requirement of due process, and in such proceedings it has always been required, explicitly and implicitly, in all views of the law, that full safeguard be observed of right of confrontation and presence, as well as notice, both as to the individual affected, and, if he be unable adequately to act in his own behalf, as to his family, or appointed guardian.

Thus in *Buck v. Bell*, 274 U. S. 200, the eugenic sterilization statute of Virginia was sustained, against substantive challenge, only after notation by this Court (274 U. S. at p. 206) that the procedure of the affected statute provided that notice be given the concerned individual, and his family, and that ". . . the inmate may attend the hearings if desired by him or his guardian." At page 207, note was particularly taken there, "The attack is not upon the procedure but upon the substantive law."

In *Skinner v. Oklahoma*, 316 U. S. 535, 541, this Court, in discussing the hard consequences of even eugenic asexualization, observed:

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."
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> —*Skinner v. Oklahoma, supra*, 316 U. S. at p. 541.

In *Davis v. Berry, supra,* 216 Fed. 413, 418 a statute providing for sterilization was held void, among other grounds, because it permitted hearing "in the prisoner's absence . . ." (216 Fed. at p. 418.) Said the court there:

> "[The] hearing was a private hearing, and the prisoner first knew of it when advised of the order. Due process of law means that every person must have his day in court, and this is as old as Magna Charta; that sometime in the proceedings he must be confronted by his accuser and given a public hearing."
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> —*Davis v. Berry supra,* 216 Fed. at p. 418.

In *Williams v. Smith,* 190 Ind. 526, 527, 131 N. E. 2, this express language is adopted and approved. There, a statute providing for sterilization was held void as violating procedural due process, because, among other reasons, there was denied right of confrontation and right of cross-examination.

In *In re Hendrickson,* 12 Wash. 2d 600, 123 P. 2d 322, the Supreme Court of Washington held void, as a violation of due process of procedure, a sterilization statute failing to provide for notice, right of presence and confrontation to the families, and guardians, of accused defectives, as well as and in addition to providing for such rights as to the concerned persons individually.

In J. H. Landman, "Human Sterilization" (1932) at pages 116-117 it is stated that "the application of [procedural] due process of law to the question of human sterilization legislation is obvious," and an accused defective "[cannot be] precluded from defending himself or herself at . . . hearings" so purposed.

In Weihofen, "Mental Disorder as a Criminal Defense" (1954), at page 43, it is stated:

> "In addition to the substantive requirements of the due process clause that an invasion of personal liberty must be found reasonable to be held constitutional, procedural due process requires that a person's rights be determined in a fair and orderly way, upon adequate notice and opportunity to be heard. Even if the statutory definition of the classes subject to sterilization is not unreasonable, procedural due process requires that an individual be given a fair hearing on whether he in fact comes within the class mentioned. Under the typical statutory procedure, if the superintendent upon examination of the patient is of the opinion that the operation should be performed, he petitions an administrative board to conduct a hearing. The patient is served with a copy of the petition and is usually allowed to appear at the hearing and to be represented by an atorney. This satisfies the requirement of procedural due process."

Accord:

> "Whether or not the statute offends the Constitution in that it fails to provide due process of law, cannot be entered into here. . . . It is sufficient for our purposes to state that 'due process of law means that every person must have his day in court . . . that some time in the proceedings he must be confronted by his accuser and given a public hearing.' "
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> —Note, "Sterilization Laws; Their Constitutionality," 17 B. U. L. Rev. 246, 252.

In discussing the necessity in asexualization proceedings —much exceeding the need in matters affecting merely property—for securing full rights of due process of

procedure and fair hearing, notwithstanding that such proceedings are not punitive in purpose, the Supreme Court of North Carolina, in *Brewer v. Valk*, 204 N. C. 186, 191, 167 S. E. 638, stated:

> "Under the due process clause, can this sterilization be done *without notice or a hearing?* It has long been settled to the contrary in this jurisdiction—we have many cases affecting property rights. * * * It goes without saying that the same must apply to human right. If the Constitution and laws in relation to due process—notice and hearing, which undoubtedly apply to a material thing, they should more so apply to the human element. 'And he said unto them, What man shall there be among you that shall have one sheep, and if it fall into a pit on the Sabbath Day, will he not lay hold on it and lift it out? *How much*, then, is a man better than a sheep?' St. Matthew 12: 11, 12. (*Miller v. Cornell*, 187 N. C. at p. 555.) The matter of sterilization and contraception is discussed in Herzog, Medical Jurisprudence, c. xlvii at p. 713, where it is said: 'The Virginia statute [provides that no sterilization shall be imposed without a hearing by a board of experts] *at which time the patient may defend himself or herself* . . .'"
>
> —*Brewer v. Valk, supra*, 204 N. C. at p. 191, emphasis in original.

Accord:

> "We think that the bill not only violates the Fourteenth Amendment of the Federal Constitution as to due process, but [also the State due process clause, as well]. We think that the sterilization of a person is such an injury to the person as is contemplated by the quoted provisions—just as much so as to deprive him of any other faculty, sense, or limb—and that due process of law means that this cannot be done

without a hearing on notice before a duly constituted tribunal or board, and, if this is not a court, then with the untrammeled right of appeal to a court for a judicial review from the finding of the board or commission adjudging him a fit subject for sterilization. This right the bill in question denies, or does not preserve; hence it is unlike the Virginia statute . . . dealt with and upheld in the case of *Buck v. Bell*, 274 U. S. 200."

—*In re Opinion of the Justices*, 230 Ala. 543, 547, 162 So. 123.

See also:

Smith v. Schaffer, 126 Kan. 607 608-609, 270 Pac. 604-605;

Smith v. Command, 231 Mich. 409, 422-427, 204 N. W. 140, 144.

IV.

Aggravated Circumstances at Bar Rendering Particularly Grievous the Denial of Due Process of Law, by Denial by Right of Presence, at Bar.

A. The Trial Was Totally in Absentia.

A trial conducted even in small part in premises of unfair procedure, lacking in any of the fundamental safeguards of due process hearing, is, in true sense, trial without security of right, and is violative of the Constitution. If one juror, of twelve, is a false juror, or one witness, of many, is a perjured witness knowingly suborned at instigation of the government, or if mob domination undermines a one-tenth portion only of the material proceedings in a trial, fair judgment, by Constitutional process, is not had. Similarly, if one witness, in proceedings affecting many witnesses, is examined *in camera*, public trial is denied.

In like and equal manner, if one witness, even out of many, is examined *ex parte*, and by "deposition," as below, in violation of mandatory, secured right of presence—and thereby without confrontation, cross-examination or any substantive participation by the accused—there is, in true sense, violence to the requirements of fair hearing and a denial of due process of law.

But at bar the denial was *total*, and the injury, therefore, was *entire*.

At bar, save for inconsequential evidentiary matters affecting alienage only, the *entire substance* of petitioner's hearing was conducted in Hawaii, while petitioner, and his counsel, were in Los Angeles, and while petitioner was in confinement there. The "depositions" taken thus *ex parte* and without pretense of secured presence, constituted, as previously related in the Statement of the Case, *supra*, the *sole* evidence offered by the government as to the substantive issue of claimed deportability.

This is *total trial in absentia*.

Accordingly, at bar, the vice of foreign, *ex parte* depositions, had without presence, assumes the qualitative measure and degree of *total* impropriety of procedure of trial, not merely partial or incidental variation of form. Unless condemnation in such serious deportation proceedings as at bar may be had without any requirement of right of presence at all, the proceedings below must fail. The requirement of due process is that "justice . . . not only be done but . . . manifestly be seen to be done." (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 172, n. 19, Frankfurter, J., concurring, quoting the English decision, *Rex v. Bodmin Justices* (1947), 1 K. B. 321, 325.) *Total trial in absentia*, in a proceeding affecting liberty, and even jeopardy of life, cannot be "justice . . . seen to be done."

B. At Bar Passport-Photo Identification—(With Name Thereon)—Was Substituted Totally for Right of Confrontation.

As set forth in the Statement of the Case, *supra*, the deposition-witnesses in Hawaii predicated the entirety of their *ex parte* "testimony" in the case below upon "identification" of petitioner had *solely* on basis of examination of a Chinese passport-photo and passport [Ex. 2], issued to "David Hyun," and so showing upon its face. [Ex. 2; R. 234, 244-245, 261; *cf.* R. 108-109.]

It makes a mockery, entirely, of the right of *confrontation*, of accusation had only *face to face*,—a right bearing deepest roots, as seen, in history and in due process law and requirements of fair hearing—to suffer substitution therefor of accusation by passport-photograph—and by document bearing the victim's name upon its face, at that.

Such process cannot be "due" process for liberty or life; it is undependable, unsafeguarded process upon very statement.

C. The Deportation at Bar Affected a Life-Resident Alien, Lawfully Admitted, and Put in Issue Gravest Jeopardies to Liberty, and Even to Life, or of Physical Persecution, to Petitioner.

The jeopardies and threatened consequences to liberty and person, and even life, put in issue by the deportation proceedings below, as set forth heretofore in the Statement of the Case, were of such quality and number as to equal, and indeed in features surpass, the consequences in any criminal proceedings, even of the most serious nature.

Purposed by the government, in the proceedings below, was deportation of an alien who, in earliest childhood had

entered the United States lawfully, and with his parents, for permanent residence, an alien who has now lived all of the meaningful years of life to date in the United States and knows no other homeland. Save for purest accident of place of birth petitioner's life is and has been, in all respects, as if actually born within the United States and always there resident. Petitioner is married to a citizen wife, is an architect by profession, and is the father of two minor children, sons, both citizens as well. Hence, even leaving aside momentarily the matter of jeopardy to life or of physical persecution, there is issued at bar deportation in its most hurt-inflicting form, involving in the words of this Court, the full "equivalent of banishment or exile" (*Fong Haw Tan v. Phelan*, 333 U. S. 6, 10; *Jordan v. De George*, 341 U. S. 223, 231), and loss of "all that makes life worth living." (*Ng Fung Ho v. White*, 259 U. S. 276, 284; *Bridges v. Wixon*, 326 U. S. 135, 147.)

In such a proceeding due process, if it is to be meaningful at all, must secure fairness of hearing measured by at least the *minimals* of fairness required in criminal and non-criminal proceedings outside deportation affecting liberty, person or life, including, in particular and specifically, the fundamental safeguard of mandatory, secured presence of the person accused or affected.

Petitioner at bar, if deportation be had, forfeits family, liberty and homeland, and faces literal "banishment and exile" from the only country known to him. It cannot accord with reason to suggest that such can be imposed upon him with less regard for fair hearing because only inflicted in deportation proceedings. It denies all substance in law to say the Constitution in securing fair hearing

regards less a man's liberty or life, because merely government chooses the form and forum of deportation, rather than of criminal charge, under which to proceed.

Forcible, total and permanent separation from wife and children, loved and loving as at bar, is a forfeiture which in itself is exceeded by few criminal penalties, if any, in severity. Deportation threatens such.

Further, consider the consequences of life exile or banishment, as a forfeiture. Though anciently used in criminal causes when primitive values* and mores obtained, and particularly in political causes, such consequence is admitted in modern society for *no* offense, but is condemned universally as unfitting to civilized standards. Banishment and exile, to roam the world at large, under our Constitution would plainly be barred as cruel and unusual punishment if imposed as penalty for a crime, no matter by how fair a hearing guilt might first be determined. It accords little with fair policy to suggest that such a consequence, so grievous in nature as to be Constitutionality "fit" as punishment to no possible crime, can yet be validly inflicted without even fairness in hearing and judgment because only given different name and motive by government in proceedings of deportation.

Moreover, at bar there obtained even jeopardy to life, and of physical persecution. As heretofore related, deportation was purposed by the government at bar to South Korea, as country of destination, a land wherein, as evidenced by circumstances judicially noticeable by this Court and widely commented upon by informed and able observers, there has been secured in the recent past small

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*Stephen, "A History of the Criminal Law of England" (1883), Vol. I, pp. 14 and 23.

guarantee even for life or person where political dissent has been manifested or upturned.

As previously related, petitioner, as an avowed and open political critic and opponent of Syngman Rhee, and of his government and policies, claimed jeopardy, if deportation be had to South Korea, of physical persecution or death. In administrative proceedings paralleling the review proceedings here, petitioner made application on ground of such jeopardy for an administrative stay against deportation to such country, on basis of extensive documentary material and affidavits of impartial, informed individuals.

After administrative hearing an order granting such stay, on basis of jeopardy of physical persecution, was issued by the Service, and such stay is presently in effect. However, stay orders of this character, are discretionary, and temporary only, under the statutes, and do not eliminate jeopardy since they are subject to recall with no certainty of right.

The jeopardy to life, and of physical persecution, in South Korea, to persons dissident from the policies of Syngman Rhee, is a matter evidenced by the known record of history. It is history that Rhee has many times jailed, interfered with and intimidated members even of the South Korean Assembly; that in June, 1953 in violation of all undertakings to both the United Nations and the United States, Rhee "released," and violently, all U. N. held prisoners of war of Noth Korea; and that in August, 1955 he instigated, approved and condoned "demonstrations," involving extensive violent acts, against members of the United Nations Truce Inspection Team in South Korea, and troops attending them, including

United States troops and officers. World comment has included such as the following: Harpers Magazine, February, 1954: "[Rhee] is without question a dictator, seldom reluctant to use police intimidation and force . . . [He] has used mob violence . . ."; Walter Sullivan, New York Times, January 31, 1950: ". . . Torture appears to be an accepted practice . . ."; The London Times, April 21, 1954: ". . . strong-arm methods . . ."; Los Angeles Times, August 8, 1955: ". . . strong-arm methods"; William O. Douglas, "North from Malaya" (1953), p. 5: ". . . some of the . . . opposition has either fled the country or is in jail . . ."; Los Angeles Times, June 24, 1953: "Dr. Chough Pyong Ok, former Home Minister, was beaten severely and his Seoul residence ransacked early today because he spoke out against Rhee's actions."; New York Times, June 5, 1952: "Britain protested today to President Syngman Rhee over his purge of hostile members of the South Korean Assembly and continuation of martial law in Pusan . . ."; Newsweek, June 9, 1952: "President Syngman Rhee declared: '. . . The majority of the National Assemblymen (of the Republic of Korea) were traitors in the pay of the enemy. They must be jailed in order to save democracy . . .'"; New York Times, July 19, 1953: "Mr. Chough 59 year old member of the National Assembly, was seized, and beaten and then jailed for daring to speak in favor of the UN Command and [daring to criticize] President Rhee for ordering the release of the 27,000 anti-communist prisoners-of-war."

In petitioner's administrative hearing on physical persecution affidavits respecting jeopardy were filed which included declarations such as the following: Frank Gibney, associate editor, Time Magazine, April 4, 1954: "If

Mr. Hyun is politically objectionable to Syngman Rhee . . . there is no doubt in my mind that he will be subject to physical persecution, possibly of the direst nature, on his return to Korea."; Elmer H. Brown, American Friends Service Committee, March 10, 1954: "It is my thoughtful opinion that should the deportation of David Hyun to South Korea be consummated it would probably be tantamount to the death sentence."; Roger N. Baldwin, American Civil Liberties Union, March 10, 1954: ". . . I have no doubt whatever that David Hyun would be regarded by that government as a Communist and would be subjected to imprisonment for a long term or execution as such."; Willard S. Townsend, International President, United Transport Service Employees Union, March 10, 1954: "That it is my considered opinion, based on past knowledge of political conditions in South Korea that great bodily harm and possible death would come to David Hyun were he deported to that country; . . . "; Stewart Meacham, Labor Advisor to the Commanding General of the United States Armed Forces in Korea 1946-1947, February 16, 1954: ". . . it is my considered belief . . . that he will meet with violent death shortly after his arrival in South Korea . . . I have in mind specifically the murder of Kim Koo, the wartime summary executions of men, women and even their children, the use of terror methods against the legislative assembly, the physical assaults . . . and the imprisonment[s] . . ."

In fine, the premises at bar exemplify deportation in its most hazardous and pain inflicting form possible, with forfeitures affecting liberty, and even life, equalling, and indeed in features surpassing, the penalties put in issue in any criminal cause, even the most serious. In conse-

quence, particularly at bar, deportation process, to be fair and sufficient under Constitutional requirement of due process of procedure, must require at least the minimum rights and safeguards indispensable to just judgment in criminal and non-criminal proceedings outside deportation affecting seriously, limb, liberty or life.

D. The Violation of the Right of Presence Below Was Needless and Was Had Only to Suit Government Convenience and Economy.

Particularly to be noted at bar, also, is the circumstance that denial of the safeguard of presence, and resort to depositions, was undertaken below out of no reason or compulsion of necessity, but solely for considerations of convenience and accommodation.

The witnesses whose depositions were taken, as heretofore stated, all resided in Hawaii and were within Federal jurisdiction, and were living and well, and all such witnesses *could* have been produced by the government at petitioner's hearing had the government so undertaken. They were not produced simply because appearance in Hawaii by deposition suited convenience. As set forth in the Statement of the Case the *sole* basis offered by the government for the motion for the depositions was that: ". . . the persons . . . are residents in the Territory of Hawaii, and for that reason the motion [is] made . . ." [R. 118].

Thus the instant case carries with it a fearsome precedent—trial without presence in deportation wherever such a procedure suits administrative convenience and choice.

It was conceded below by the government [R. 215-218] that deportation witnesses within the United States (and Hawaii is no different) are on occasion moved by the

government from one place to another to permit production at place of hearing for purposes of confrontation and cross-examination, the example given being the production at various political deportation hearings of the witness Paul Crouch. The government seeks here a ruling that such production is at pleasure and not of right.

If such precedent be established the spectacle is presented of possible wholesale deportation trials in *absentia* with accusations made by informer witnesses in New York or Washington, D. C., on wholesale scale, while the hapless alien victims are miles removed in California or other distant points, and where the breaking of life and family is had totally *ex parte* and without check or restraint whatever by confrontation or cross-examination.

Under law, where the right of presence obtains at all disregard of it may be justified only by *necessity*. Subsumed within presence are the included rights to confront witnesses, to cross-examine, to observe the conduct of one's trial, and the right to assist, and be assisted by, counsel. Disregard of such fundamentals of fair hearings can only be justified by compelling necessity.

Where a witness cannot be produced at the place and forum of hearing because dead, ill, insane, or beyond the physical jurisdiction of the hearing tribunal, if the testimony is available in a form taken under oath, as by deposition or at a preliminary proceeding or prior trial, or if uttered as a dying declaration, due process, out of *necessity* only, accepts the testimony without appearance. But this is by force of irremediable circumstances only, not in any measure to accommodate to pleasure or convenience merely. (*Kirby v. United States*, 174 U. S. 47, 61; *Motes v. United States*, 178 U. S. 458; *Mattox v.*

United States, 156 U. S. 237, 242-243; *Dowdell v. United States,* 221 U. S. 325, 329 *et seq.; West v. Louisiana,* 194 U. S. 258.)

To tolerate violations of so basic a human right as involved at bar—right of presence at trial—on basis merely of convenience and accommodation, and without compulsion of necessity, is unseemly, and is unbecoming to civilized estimates of man's worth and dignity; such action in such premises is *particularly* violative of Constitutional requirements of fair trial by due process.

E. The Depositions at Bar Particularly Required Presence, Confrontation and Cross-examination.

As set forth in the Statement of the Case the depositions at bar were not only taken *ex parte* but were characterized by grossly objectionable and leading examination, and were of a character particularly requiring the restraints of adversary proceedings, with presence of the person accused and with confrontation and cross-examination.

No discipline or restraint whatever was imposed by the acting Hearing Officer, and, of course, no objections were interposed, neither petitioner nor counsel being present. On offer of the depositions in the Los Angeles proceedings, moreover, not a single objection to the questions and answers was sustained [R. 133-199], although violations of fair examination and of the most basic rules of evidence occurred many, many times over.

The full examination of the witnesses appears in the Record at pages 229-266. The witnesses were examined by offensively leading and "educative" questions [*e.g.*: "Q. You know this because of your familiarity with the communist procedures, is that correct? A. Yes."—R.

238], and were invited and encouraged to express merest conclusions, opinions, and even "guesses". [See R. 234-235, 237-239, 246, 249-252, 261-266.] They were asked, even, to state whether as witnesses they had "no reason to doubt" the charges against petitioner, or whether any persons attending given meetings were known to them *not* to be members of the Communist Party. Witness:

> "Q. Based upon your experience in the Communist Party, do you have any reason for doubting that David Hyun was a member of the Communist Party? A. No reason at all."
>
> —[R. 263.]

> "Q. Were these meetings to the best of your knowledge and belief concerned with Communist Party business? A. What was that?
>
> Q. Were these meetings to the best of your knowledge and belief concerned with Communist Party business? A. I do.
>
> Q. Was there anyone at these meetings who was known to you as not a member of the Communist Party? A. Not that I know of.
>
> Q. Can you state definitely that all the persons at this meeting were members of the Communist Party? A. Well, according to my thinking anybody who is in that certain particular night there that they call meetings, who are there, well, I think they are communists.
>
> Q. You kno wthis because of your familiarity with the communist procedures, is that correct? A. Yes."
>
> —[R. 238.]

> "A. Well, from my own opinion I think he is a communist. Otherwise I have never seen his card but by seeing him at the meetings.
>
> Q. Did you have any reason for believing that he was not a communist? A. I have no reason to

believe that he is not a communist. He must be one because of being at the meetings.

Q. Because he attended closed meetings of the Communist Party which you knew was not open to anyone else but Communist Party members, is that correct? A. That's correct, because I know it is a meeting and nobody else would be in it."

—[R. 229.]

Additionally, the witnesses were alleged accomplices, and their testimony as such was therefore particularly requiring of confrontation and cross-examination.

It must be remembered, also, that the area of the questioning in the depositions affected merest issues of speech and association, and related *in se* to no single wrongful act or undertaking. In consequence, questions of understanding, meaning, purpose and intent, not to say *scienter* (*cf. Galvan v. Press,* 347 U. S. 522), were, or possibly might be, crucial in comprehending or assessing and evaluating any asserted act, expression or association. Fair examination was, therefore, particularly crucial. It was not had. In place, an examination so partial and leading as to be virtually word-giving, was conducted.

Because of the character of the witnesses, the examination and the subject matter of the depositions at bar, therefore, there was particularly required in the instant case observance of the requirements of presence, confrontation and cross-examination.

F. The Depositions at Bar Were Within the Area of the First Amendment.

A final circumstance aggravating the vice of denying below a hearing safeguarded by presence of the accused and counsel is the fact that the charge and testimony in the case at bar fell definitionally within the area of associa-

tion, assembly, speech and opinion, protected in the first instance by the First Amendment.

The Constitution requires particularly jealous and exacting inquiry where limitations of right affect the area of the First Amendment, whether the issue of limitation arises as one primarily of fact (*Pennekamp v. Florida*, 328 U. S. 331, 335; *Cantwell v. Connecticut*, 310 U. S. 296; *Craig v. Harney*, 331 U. S. 367, 373; *Fiske v. Kansas*, 274 U. S. 380, 385), or of law, policy and interpretation (*Winters v. New York*, 333 U. S. 507; *United States v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4; *Thornhill v. Alabama*, 310 U. S. 88, 95; *Schneider v. State of New Jersey*, 308 U. S. 147, 161; *Bridges v. California*, 314 U. S. 252, 262-263.)

Grave danger even to citizen speech and association lies in permitting in deportation hearings penalties on speech safeguarded so little by rules of fair hearing as to reduce guilt to matters only of merest association, or of conjecture, surmise or malice expressed only by witnesses examined without the safeguard of the presence of either the accused or his counsel.

Conclusion.

At bar petitioner was not present at his trial. He was present at proceedings amounting only to a sham; the substance of his entire cause was held in Hawaii by "depositions", without his attendance, though the witnesses could have been brought to confront him at his hearing, save for government convenience and accommodation only.

Petitioner was in custody by the Service throughout his hearings and was not rendered present at the Hawaiian depositions. Only after the fact was he even advised he

conceivably could have been present, had he "asked" so, and had he been positioned to provide private financing of his transportation there and return, together with "guards" to secure him—an alternative petitioner was without means, in any event, to invoke.

The exact proceedings at bar would have been rejected and condemned as plainly violating minimum Constitutional rights had the proceedings below been criminal proceedings for meanest misdemeanor, or been insanity confinement proceedings or proceedings to authorize sterilization operation. That is, were society in the instant case purposing to asexualize petitioner, by painless operation, and to deprive him thereby of future, unborn children, or right thereof, there could not have been had the arbitrary, disregardful and right-denying "hearing" or "trial" undertaken below, denying mandatory right of confrontation and presence. Yet at bar the deportation proceedings purposed equal, if not greater cost and loss, including, specifically, forceable separation from wife and two *living* children, loved and loving. Again, were society intending only to confine petitioner for treatment and cure of claimed insanity, it could not be conceived there could have been held such proceedings as below—*ex parte* depositions without even secured right of presence by the accused. Yet life banishment and exile is longer lasting by far in injury to liberty than curative confinement for mental illness, and, moreover, there is not present the circumstance of want of mental comprehension easing pain or consequence. Finally, were society purposing in any manner to punish petitioner for crime, in great or minor measure, and

particularly if in manner affecting liberty or life, the procedure had below would be held violative of Constitutional fair hearing *out of hand*. Yet the "punishment" at bar surpasses in consequence most criminal causes, and equals any—short at least of offenses punishable with certainty by death.

The Service, and the Court below, justified the peremptory proceedings below, and disregard of the fundamental security of right of presence, on the basis merely—and avowedly—that deportation proceedings are "civil", and that by token of this premise alone, deposition process was fair enough process there, and right of confrontation did not obtain. This was error, and fundamental error.

In civil proceedings amounting only to contests affecting *property* matters, or money, and occurring between private and equal litigants only, there may be fairness in assuming that rights not asserted even at the premium of costly, distant action, as attendance at foreign "depositions," represent in reasonable probability only balanced compromises had after weighing of costs against stakes, and that what is ill-defended is likely also small of worth and little needful of defense. It is otherwise entirely where proceedings, however denominated, affect forfeitures of liberty, person or life, and where such are government-instituted, and involuntary. There, whether the proceedings be denominated "civil" or "criminal", a fair hearing must be *provided*, not merely be not prohibited, and there foreign depositions without confrontation and right of presence cannot be had save in cases of *necessity*. Grave process requires hearing rendered *sure* of fairness

to be "due". Forfeiture of liberty, body or life, whether purposed by society as punishment or not, requires hearing commensurate with its nature. Process, like punishment, must fit the cause; and before heaviest blows, there must be fairest hearing and this without regard for fine distinctions as to form or "purpose" in society's act.

Society cannot afford to be careless with liberty, person or death.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 201

DAVID HYUN, PETITIONER

v.

HERMAN R. LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 45–53) is reported at 219 F. 2d 404.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1955 (R. 53). Rehearing was denied on April 7, 1955 (R. 53–54). The petition for a writ of certiorari was filed on July 1, 1955, and granted on October 10, 1955 (R. 54). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether in the circumstances of this case it was an abridgment of procedural due process to admit into evidence, in a deportation proceeding in Los Angeles, testimony of witnesses taken by deposition in Honolulu.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the ac-

cusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

8 C. F. R. [1951 Supp.] 151.2 (a), 15 F. R. 7637, provided:

> *Conduct of hearing*—(a) *Hearing Officer; general powers.* The officer assigned to conduct the hearing under a warrant of arrest shall be referred to as the "hearing officer." He shall have authority to (1) administer oaths and affirmations, (2) issue, during the course of the hearing, any subpenas authorized by law, (3) conduct the hearing and rule upon all objections to the introduction of evidence or motions made during the course of the hearing, (4) take or cause depositions to be taken, (5) make decisions in accordance with § 151.5, (6) grant voluntary departure or preexamination pursuant to § 150.3 of this chapter, or both, and (7) take any other action consistent with applicable provisions of law and regulation.

STATEMENT

This habeas corpus proceeding arose as a challenge to a deportation order (R. 59–62), based on petitioner's membership in the Communist Party, which was affirmed by the Board of Immigration Appeals (R. 56–58). The District Court for the Southern District of California denied the peti-

tion for the writ (R. 37–38), and its action was affirmed on appeal (R. 53).

Petitioner, a native of Korea, was admitted to the United States at Honolulu, Territory of Hawaii, on May 26, 1924 (R. 112, 206, 228B, Ex. 4). He was subsequently admitted to the continental United States at Los Angeles, California, on September 1, 1947, carrying a passport indicating his birthdate as January 3, 1917, and his birthplace as Kirin, Manchuria (R. 109, 110, 205–206, 228, 228A, Ex. 2, 3).

The deportation proceedings against petitioner were commenced by the issuance of a warrant of arrest on October 31, 1950, charging him with being unlawfully within the United States and subject to deportation under the provisions of the Act of October 16, 1918, as amended, for the reason that he was found to have been a member of the Communist Party of the United States after entry. He was served with the warrant and arrested that same day, after being informed as to the cause of arrest, the conditions of release, and his right to counsel. (R. 227–228.) On November 3, 1950, petitioner's counsel, Milton S. Tyre, who had entered an appearance in the case over a year before,[1] filed a petition in the United States District Court for the Southern District of California seeking petitioner's release on administrative bail. The writ of habeas corpus was ultimately

[1] Mr. Tyre had represented petitioner since August 9, 1949, when he was arrested under a prior warrant (R. 104, 202).

discharged on January 22, 1951. *Hyun* v. *Landon*, No. 35, O. T. 1951, R. 140–143. See also: R. 100, 105.[2]

On November 22, 1950, the deportation hearing was commenced in Los Angeles, California. Petitioner was called as a witness and was sworn (R. 99–100). After he admitted his identity and that the warrant had been served on him (R. 100), the hearing officer explained the charges against him and the purpose of the hearing (R. 100–102). His counsel, Mr. Tyre, then moved for a continuance for "a couple of weeks" to prepare a defense, explaining that pressure of other business, including the habeas corpus appeal, had prevented proper preparation of the case. The hearing officer denied this motion on the grounds that the petitioner would have to be continued in custody pending determination of deportability, and the government had as yet produced no evidence which would warrant a continuance to procure countervailing evidence. (R. 103–106.) Petitioner was then questioned further but refused to answer all questions, including one as to his full name, on the asserted basis that he was unprepared (R. 107–112). On being questioned concerning pres-

[2] The subsequent history of this proceeding is more fully set forth in the opinion in *Carlson et al.* v. *Landon*, 342 U. S. 524, in which this Court sustained petitioner's detention without bail pending the deportation proceedings. See also the opinions of the United States Court of Appeals for the Ninth Circuit in *Carlson* v. *Landon*, 186 F. 2d 183, 187 F. 2d 991, and *Hyun* v. *Landon*, 186 F. 2d 190.

ent and past membership in the Communist Party, petitioner refused to answer on the same ground and on the further ground that the answers called for were incriminating (R. 112–114).

The examining officer thereupon made a motion to take the depositions in Honolulu, Hawaii, of four named persons (R. 114). Counsel for petitioner objected to the motion on the grounds (1) that he had had insufficient time to prepare the case for hearing and (2) that the proceeding was in violation of law because the warrant of arrest had been improperly served (R. 115). Counsel was given the opportunity to expand his objections in a written brief (which he failed to do) (R. 115–116). The hearing officer then made the following ruling (R. 117–118):

> It is deemed that counsel has no documentary evidence to present at this time that has a bearing on the issue in the case. The motion of the Examining Officer to take depositions from the named persons in Honolulu, Territory of Hawaii, at some future date, is granted.
>
> Counsel will be given notice of the date those witnesses will appear at the Office of the United States Immigration and Naturalization Service in Honolulu, T. H., and at that time, the respondent may be represented there by counsel, and may present witnesses, and counsel may submit interrogatories, which will be propounded if he so desires on the dates the named witnesses appear in Honolulu.

When counsel objected that the motion did not explain the matter to be obtained by deposition, or why the depositions were being taken in Hawaii, the examining officer said (R. 118–119):

> I will say for the record that the persons I mentioned are residents in the Territory of Hawaii, and for that reason the motion was made, and it is expected that the testimony will elicit facts relating to the respondent's membership in the Communist Party of the United States as charged in the warrant of arrest.

Petitioner's counsel was again given an opportunity to enlarge on his exceptions in a brief (R. 119). The hearing was then adjourned, to be resumed at a future date on notice to counsel (R. 119). At no time during this hearing did petitioner request that he be allowed to go to Honolulu for the deposition taking. At no time did he state that he was financially unable to retain counsel in Honolulu, or to send his California counsel to Hawaii.[3]

On December 7, 1950, petitioner was sent a notice of the taking of depositions, which informed him in pertinent part as follows (R. 266–267):

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[3] In a prior proceeding, the Service made a motion to hold the hearings in Honolulu, Hawaii. Petitioner, through his counsel in the instant hearing, vigorously objected to this, and the plan was apparently abandoned in response to such objections. See the record in *Hyun* v. *Landon*, No. 35, O. T. 1951, pp. 115–116.

> Pursuant to the order of Hearing Officer John B. Bartos on November 22, 1950, in your case, depositions will be taken from the following-named persons on December 18th and 19th, 1950, at the Immigration Station, Honolulu, T. H.:
>
> Richard C. Kageyama, Easter J. Doyle, Donald Uesugi, Ichiro Izuka.
>
> Your counsel may appear personally or through associate counsel during the taking of these depositions, or you may submit interrogatories. If interrogatories are submitted, they should arrive in this office not later than 9:00 A. M., December 18, 1950.

Petitioner failed to respond to this notice in any way, or to make any objection beyond that which his counsel had already stated at the hearing.

On December 18, 1950, the deposition proceedings were convened before a hearing officer of the Service at the Immigration and Naturalization Station, Honolulu, Hawaii (R. 229). The four witnesses mentioned in the notice appeared at the time and place specified pursuant to administrative subpoenas served on December 8, 1950 (R. 231, 233, 259, 260). One of the witnesses, Richard M. Kageyama, brought his attorney with him (R. 230, 231). At the beginning of the proceeding, the following colloquy took place between the hearing officer and the examining officer (R. 229-230):

> By HEARING OFFICER. This proceeding is for the purpose of taking depositions in

the case of David Hyun as ordered by the Hearing Officer at Los Angeles, California, on November 22, 1950. Has the Examining Officer served notice upon the Respondent and his Counsel regarding these depositions?

By EXAMINING OFFICER. That is correct. I can offer a notice of appearances, a notice of the date and place specified for the taking of these depositions, dated December 7, 1950, which were sent registered mail to Milton S. Tyre, the attorney for the Respondent, and the Respondent. And further, I have been advised by attorney Symonds of the firm of Bouslog and Symonds that he has been in communication with Mr. Tyre and had originally intended to enter an appearance here. However, I have just been advised by Mr. Symonds that he does not desire to enter an appearance, nor does he desire to cross-examine the deponents today. I will offer you copies of the communications addressed to both Tyre and to David Hyun.

* * * * *

Before testifying, each of the four witnesses was sworn and was informed by the hearing officer of the penalty imposed in case of perjury (R. 230, 233, 241–242, 259). The questioning was then conducted by the examining officer.

Two of the witnesses whose depositions were taken had been officers in the Communist Party in Hawaii during the time they stated they knew petitioner (R. 235, 253). They each testified that

they had seen him in attendance at several closed Communist meetings. The witness Izuka, who was trained at a Communist training school in San Francisco (R. 251–252) and was a Communist from 1938 to 1946, testified in detail as to the organization of the Communist Party in Hawaii (R. 252–253). Izuka specifically placed petitioner at three meetings of the executive board of the Communist Party in Hawaii (R. 245, 246–248) and recalled conversations he had had with him on Communist matters at two of the meetings (R. 248). He recalled also a dispute within the Communist Party over the firing of a party worker in which petitioner engaged (R. 250–251). Izuka stated that he knew petitioner socially (R. 250) and as a member of the executive board of the Communist Party in Hawaii (R. 256).

On January 15, 1951, the transcribed depositions were received in the Los Angeles office of the Immigration and Naturalization Service, and on January 22, 1951, a copy of the transcript was sent by registered mail to petitioner's counsel with instructions to submit cross interrogatories if he had any within 10 days. When none were received, the Service examining officer made repeated efforts to reach petitioner's counsel by telephone, leaving word each time that he inform the Service as to his intentions. Petitioner's counsel failed to respond to any of these messages. (R. 125.)

On March 13, 1951, the deportation hearing was reconvened and the depositions were marked for identification. Petitioner's counsel again moved for a continuance in order that petitioner might be allowed to study the depositions and determine whether he would submit cross interrogatories and, if so, what interrogatories. The hearing officer granted this motion despite the fact that petitioner's counsel had had a copy of the depositions for almost two months. Petitioner was allowed 10 business days to assemble his cross interrogatories. The new hearing date was set for March 28 and 29, 1951. (R. 120–124.)

On March 28, 1951, the hearing was again resumed (R. 124). The depositions were offered in evidence and counsel for petitioner was allowed to state his objections for the record. The gist of his argument was that the Service should have provided funds to send both petitioner and his counsel to Hawaii to confront the deposition witnesses and cross-examine them: that both the proceeding and the statute under which it was being conducted were unconstitutional; and that he was being illegally restrained of his liberty. (R. 128–130.) The hearing officer then made the following rule (R. 130–131):

> You have made an over-all objection to the depositions and you have made two over-all objections to the proceedings. We will take your first three objections up at this time.

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In deportation proceedings the government does not have the burden of sending the respondent or his counsel to the place where the depositions are taken. Therefore, your objection on that ground is overruled.

As to the constitutionality of the McCarran Act, that is not for me to determine. It was passed by the Congress of the United States. The charge in the warrant of arrest in this case is within that Act. The constitutionality of the Act is for the courts to determine, not me. Counsel's objection on that ground is overruled.

As to the matter of the detention of the respondent that is not within my province to release him or detain him. The Attorney General ordered him detained. Counsel has petitioned for a writ of habeas corpus because of the detention of the respondent. The petition was dismissed in the United States District Court. The ruling of the District Court was affirmed by the United States Circuit Court of Appeals for the Ninth District. Counsel's objections on those grounds are overruled.

Counsel were there any other objections interposed in there on those general grounds that I perhaps have missed?

COUNSEL. No.

Petitioner's counsel denied that any attorney had been retained for his client in Hawaii. While he admitted receiving advance notice of

the deposition proceedings there, he contended that it was essential that either he or petitioner be present in Hawaii to conduct the cross examination. The following colloquy took place between the hearing officer and petitioner's counsel (R. 132):

> HEARING OFFICER. Just one moment, Mr. Tyre, I see here and I know that Mr. Hyun was not represented by counsel out there. However, I do not make any agreement with your statement that it was impossible that he be represented there at the time the depositions were taken.
>
> COUNSEL. Well, by impossible I don't mean it was physically out of reach. I mean that it was impractical for David Hyun to be represented in Honolulu by another lawyer to cross examine witnesses without the presence of Mr. Hyun to assist in such cross examination, or at least without the presence of his own counsel, which I think in itself would have been inadequate. I am not asking the Hearing Officer to agree or disagree. That is merely a statement by me so that there will be no question on the record as to his representation in Honolulu.
>
> HEARING OFFICER. There is no question in my mind he was not represented there but there is also no question in my mind but that he could have been represented there.

The examining officer noted that petitioner could have been present under guard at the deposition proceedings had he made any request for such an opportunity (R. 132–133).

Counsel for petitioner stated that it was impossible to employ written cross-interrogatories to question the witnesses in Honolulu under the circumstances, and that he would submit none (R. 200).

Petitioner was then recalled to the stand by the examining officer to answer questions which he had previously contended he was unprepared to answer (R. 201–202). He gave his full name and stated his belief that he had been born in Seoul, Korea, on January 3, 1917 (R. 202–203). He also said that he thought himself to be a citizen of China, as his passport indicated (R. 205–206). Petitioner refused to answer a series of questions as to membership in the Communist Party of the United States, claiming fear of possible incrimination and violation of his First Amendment rights (R. 208–210). He likewise refused to state whether he knew each of the four government witnesses whose testimony was taken by deposition, on the same grounds (R. 210–211). Counsel for petitioner then moved for a further continuance to prepare a defense, and the following exchange took place between him and the hearing officer (R. 212–213):

> HEARING OFFICER. Have you any statement as to what you intend to introduce?

I don't mean you have to name your witnesses or disclose what evidence but I would like to have some idea as to your intentions.

COUNSEL. I intend to correspond with Honolulu in the first place for the purpose of ascertaining what evidence is available if any for the purpose of putting on the defense and this will take some time obviously since it all has to be done by correspondence, and I am also contemplating putting on some local evidence to controvert the import, if not some of the specific statements made by the witnesses in depositions introduced as Exhibit 5.

HEARING OFFICER. Do you contemplate having witnesses appear in Honolulu as well as on the mainland?

COUNSEL. That I cannot tell until I communicate with Honolulu; I don't know; I have never been there and heretofore I haven't been in correspondence with them concerning evidence.

* * * * *

HEARING OFFICER. Then you believe that there are witnesses there Mr. Tyre?

COUNSEL. I have stated that I have to communicate with Honolulu for the purpose of determining whether this evidence will be available as I have already stated on the record.

HEARING OFFICER. Then if the evidence is available in Honolulu do you contemplate that the evidence will be given in

> Honolulu? That is one thing I am *trying determine* [*sic*].
>
> COUNSEL. I would presume so. It is a little hypothetical at this time.

The hearing officer then continued the hearing to April 19, 1951, in order that petitioner's counsel might ascertain and state what evidence he wished to present (R. 213).

On April 19, 1951, the hearing was again convened. Petitioner's counsel stated that he had been in contact with Honolulu, and reiterated that he could not cross examine the government witnesses unless petitioner could either be sent there or the witnesses brought to Los Angeles. He again made a motion to this effect which was denied. (R. 216.) A motion to strike the depositions was likewise denied (R. 220). During argument on petitioner's motion, the examining officer made the following observation (R. 217):

> The government does not feel under any obligation to transport witnesses at great expense over thousands of miles. The taking of depositions is a recognized and accepted and acknowledged form of taking testimony under such conditions.
>
> At the time the depositions were taken in Honolulu counsel and respondent were notified as to the date the depositions would be taken. They could have been present if they so desired, and even though Mr. Hyun is in custody if he had indicated a

> willingness to be present arrangements would have been made to have him go to Honolulu under proper escort. However, that would have had to be under his own expense if he wanted to be present. That was up to him and that was up to counsel. They did not see fit to avail themselves of that and counsel in the alternative was given an opportunity to prepare cross interrogatories. He too declined to do this.

Petitioner's counsel then suggested that he be given a week or 10 days to find a witness who might be able to testify as to the character of the Communist Party of the United States. That motion was denied after argument as to the relevancy of such testimony. (R. 221–226.)

On April 24, 1951, the hearing officer rendered his decision, finding that petitioner (1) was an alien, a native of Korea and a citizen of China; (2) that he had entered the United States at Honolulu, Hawaii, on May 26, 1924, and was admitted for permanent residence; and (3) that he was a member of the Communist Party of the United States in Honolulu, Territory of Hawaii, during 1945 and 1946. The hearing officer rejected as not relevant two of the four depositions taken in Hawaii, but based his finding as to Communist Party membership on the depositions of Donald T. Uesugi and Ichiro Izuka, whose testimony he summarized. He recommended deportation under the charge stated in the warrant of arrest. (R. 94–98.)

On the same day, petitioner filed his written exceptions to the hearing officer's recommended adverse decision, alleging as error, *inter alia,* the failure of the hearing officer to provide transportation for petitioner and his counsel to attend the deposition proceedings in Honolulu (R. 65, 66). Petitioner also filed a motion to reopen the record and offer of proof (R. 68–69), alleging that he could, if the record were reopened, show through the testimony of Gus Hall, National Secretary of the Communist Party, or another witness, the true nature of the Communist Party of the United States, which organization was then the subject of an administrative proceeding before the Subversive Activities Control Board to compel it to register as a Communist action organization as defined in the Internal Security Act of 1950. In support of his motion, petitioner appended a copy of the amended answer of the Communist Party in that litigation (R. 70–92) and an affidavit of the National Secretary of the Communist Party, who swore on information and belief to the accuracy of the allegations set forth in the amended answer (R. 93). On April 25, 1951, this motion was denied on the ground that the character of the Communist Party was not in issue in the deportation proceeding (R. 67–68).

On August 1, 1951, an Assistant Commissioner issued an order of deportation which adopted the recommended order of the hearing officer

(R. 59–62). This order disposes of the objection to the deposition testimony as follows (R. 61):

> Counsel next protests that the hearing officer permitted depositions to be taken in Hawaii, without providing transportation to that place for the respondent or counsel. The law requires no such provision.

The Assistant Commissioner found that the evidence of petitioner's membership in the Communist Party of the United States during 1945 and 1946 was substantial and reliable and fully sustained this ground for deportation.

On March 12, 1952, petitioner's appeal before the Board of Immigration Appeals came on for hearing. Petitioner's counsel told the Board that, while his client had been told that he might have gone to the deposition hearings in Honolulu had he defrayed the expenses of both himself and two guards, "[o]bviously he had not the money to do that, or to hire an attorney in Honolulu" (R. 63). When asked what his specific application was, he replied (R. 64), "[m]y application is that the case be sent back for a hearing so as to produce competent testimony, not by deposition." In dismissing the appeal on December 1, 1952 (R. 56–58), the Board of Immigration Appeals made the following ruling relative to the deposition procedures (R. 58):

> Concerning the request of counsel for rehearing in the case to receive testimony

of witnesses to supplement the evidence in the nature of depositions or sworn statements taken about December 18, 1950 in Honolulu, Hawaii in order that counsel may cross-examine such witnesses, it is noted that appropriate notice was given to counsel for the respondent on December 7, 1950, apprizing him that such statements or depositions would be taken and giving the respondent an opportunity to be present in person or through counsel and cross-examine the deponent. It appears that an appearance was waived by counsel for the alien (Ex. 5). Counsel now contends that the alien is not financially able to send a representative to Honolulu to appear for him, and was not able to do so in November or December of 1950. There is no provision of law or regulations which requires that the United States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the State of California and depositions were taken in Hawaii. * * *

SUMMARY OF ARGUMENT

I

During the deportation hearings, extended repeatedly for postponements petitioner was granted to formulate defenses which never materialized, he had ample opportunity for cross-examination of the deponents who testified against him. At the first of four hearings which pre-

ceded the order of deportation, when the examining officer moved to take depositions, petitioner's counsel objected on the broad ground that the government had not made arrangements to transport petitioner and his counsel to Honolulu. He did not contend that petitioner was unable to have counsel present at the deposition taking to cross-examine the witnesses, nor did he suggest any special reason why it was necessary that petitioner confront the witnesses to be questioned. The record indicates that, after petitioner had been given due notice of the time and place of the deposition taking, he had been in communication with Honolulu counsel but that the decision had been made not to have counsel enter an appearance for him there.

Subsequent to the taking of the depositions, petitioner objected to their introduction in the administrative proceeding, not because he could not have had the deponents questioned by counsel of his choice or because he had been unable to attend himself, but rather on the ground that, as in a criminal trial, no testimony taken outside of his presence could be used in a deportation proceeding, regardless of his failure to articulate some timely and specific objection to such procedure or to move for some modification of the deposition order. That remains the gist of his argument.

The record shows, however, that the decision of the hearing officer to commission the taking of

depositions to procure the testimony of the witnesses in Hawaii was eminently reasonable. He might well have assumed from the nature of the issues involved that such witnesses would not appear voluntarily, but would have to be subpoenaed to testify. The question of whether an administrative subpoena could be used to compel such witnesses to travel thousands of miles poses both legal and practical problems. Even assuming the power, such procedure, frequently involving resort to auxiliary court enforcement proceedings, would have been time-consuming at the very least, and would have extended the period during which petitioner was being held without bail. Petitioner had vigorously opposed having hearings under a previous warrant transferred to Hawaii, a fact which might well have been known to the hearing officer and entered into his choice of the deposition procedure.

After the depositions were taken, petitioner was given abundant opportunity to submit written interrogatories, but following extended consideration he rejected this method of cross-examination. Then, he was given further opportunity to secure any testimony he might have either in Hawaii or elsewhere. While the record indicates that he again canvassed the possibility through his counsel, he failed to have the government witnessess cross-examined and failed to produce any evidence material to his case either then or at any other time during the two-year proceeding. His only

effort to meet the case against him on its merits was an offer to prove that the Communist Party was not of the character that Congress deemed it to be—an offer of proof that was quite properly rejected. This record suggests that petitioner's failure to defend the warrant charges was not occasioned by the use of unfair procedures, but by the fact that he had no defense to present.

II

Petitioner's thesis is that the admittedly grave character of deportation proceedings requires that the Sixth Amendment guaranty of confrontation, available to an accused in a criminal proceeding, be applied by analogy to forbid the use of depositions. This Court has consistently held, however, that deportation proceedings are not controlled by procedural requirements appropriate to a criminal trial. See, *e. g., Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594–595; *Carlson* v. *Landon*, 342 U. S. 524, 537–538; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275.

In *United States* v. *Zucker*, 161 U. S. 475, the Court held that the Sixth Amendment guaranty of confrontation "relates to a prosecution of an accused person which is technically criminal in its nature", and sustained the government's use of depositions taken abroad in a customs forfeiture case over the objection of the defendants that such action, though civil in form, was in substance a criminal case. The two circuits

which have considered the precise issue involved in this case have held against petitioner's contention that deposition testimony is necessarily inadmissible in a deportation proceeding. *Singh* v. *District Director,* 96 F. 2d 969 (C. A. 9); *Berkman* v. *Tillinghast*, 58 F. 2d 621 (C. A. 1).

The state insanity and asexualization cases cited by petitioner to demonstrate that confrontation is an essential of due process of law, where personal rights are involved, are inapposite. Those cases, arising under special legislation, involve problems of state court supervision of defectives who are incapable of managing their own affairs.

The test of due process in a deportation hearing is, not whether a particular mode of procedure is followed, but whether the hearing is fairly conducted in a manner appropriate to the administrative remedy sought. *The Japanese Immigrant Case*, 189 U. S. 86, 100–101. The concept of a fair hearing does not include a right of confrontation as a universal necessity.

III

Petitioner's argument falls with his mistaken premise that there is an absolute right of literal confrontation in deportation proceedings. Due process is afforded where there is no proper objection to the taking of the depositions and where there

is full opportunity to cross-examine the witnesses whose depositions are received.

A. From the time of the first Congress to the present (Rule 26 (d), F. R. Civ. P.), the use of depositions in a civil judicial proceeding, where the witnesses live at a distance and under other conditions of unavailability, has been accepted as a normal and acceptable procedure. While latitude is given the court on application of the party against whom the deposition is to be used to modify a deposition order in particular cases, such relief must be sought if its absence is to be a basis for a claim of unfairness. Otherwise, a deposition may be used against a party who had due notice of the taking.

The use of depositions in administrative proceedings is no more restricted, and is a normal method to be exercised at the discretion of a presiding officer, who can shape his order according to the exigencies of the particular case to an even greater extent than in formal litigation in court proceedings. As under the Federal Rules of Civil Procedure, it is incumbent on a party who feels that the deposition procedure would produce some special disadvantage to make timely objection so that the hearing officer may make some appropriate modification of his order.

B. As in civil court litigation and in other administrative proceedings, the use of depositions in deportation proceedings is permissible and has been properly authorized by the governing regu-

lations. The rights of the alien under this procedural scheme have been fully protected. He may, if it appears that a motion to take depositions will produce some special disadvantage, pray for some appropriate modification of the order. Under the general power delegated to the hearing officer, such problems can be worked out in the particular case on proper application. And on notice that depositions are to be taken, the alien has the implicit right to an opportunity to be represented by counsel at the taking—an opportunity given but not availed of by this petitioner. The deportation proceeding was presided over by a disinterested hearing officer of the appropriate district who, more than a mere notary, could participate in the questioning at any point if he deemed that necessary to protect the alien or complete the record. Such procedure does not violate fundamental notions of administrative due process.

IV

There were no special circumstances in this case making it a due process requisite that, in addition to the full opportunity for cross-examination, petitioner should have been given transportation at government expense for himself and his counsel to the place where the depositions were taken. Petitioner emphasizes in this connection the advantage his presence would have afforded for identification purposes. But identification was not a disputed issue. Not only did

he admit his identity, but the depositions left no doubt on the issue.

Petitioner also stresses the fact that all of the affirmative evidence directed to the issue of his past Communist Party membership while resident in Hawaii was developed through deposition testimony. However, the depositions were taken after petitioner had been given ample opportunity to have the witnesses cross-examined. Accordingly, this evidence was appropriately considered in the deportation hearing, as it would have been in a judicial trial. The task of evaluation belongs to the immigration officers in any event and their decision in this respect is made final by statute, especially as against collateral attack.

Although he does not now contest the legality of his detention without bail, petitioner, to buttress his argument that the Service should have "secured" his presence at the deposition taking, stresses the fact that he was continuously in custody at that time. But his detention only supports his argument on the assumption that he had an absolute right to be present at the deposition taking, and was prevented from attending because of the refusal of the Service to allow him to be present. This was not the case. He made no unequivocal request that he be allowed to attend, and he made no move to meet the deposition evidence in any manner, although given the opportunity. It is reasonable on these facts

to assume this was deliberate and not because of the deprivation of any procedural right to which he was entitled.

ARGUMENT

Petitioner argues that due process, as measured by the fundamental concepts of fairness, was violated by the introduction at the deportation hearing of depositions taken in Hawaii to establish the critical fact of his past membership in the Communist Party in Hawaii. He urges that the consequences to the individual alien of deportation are so serious that ordinary procedural standards governing deposition testimony, appropriate to civil or administrative proceedings, are inapplicable in this context—that the mere opportunity to have deposition witnesses cross-examined by counsel is inadequate. He asks this Court to import, as a procedural requirement in deportation proceedings, the principle of confrontation applicable by virtue of the Sixth Amendment to criminal trials, *i. e.,* the physical presence of the alien during the testimony of all witnesses. In this view, it is irrelevant that petitioner might have sought and obtained either his own presence or that of counsel at the deposition-taking (at his own expense), or made application for some alternative method of ~~processing~~ proceeding. It is also irrelevant that he himself had previously opposed the transfer to Hawaii of hearings under a prior warrant. His position, as we understand it,

is that anything short of personal confrontation of the deponents renders the depositions inadmissible against him.

Since what is due process can usually be determined only on the facts or circumstances of the particular case,[4] we shall first undertake to show that the four hearings which culminated in the order for petitioner's deportation were demonstrably fair; that petitioner was afforded every opportunity to present a defense to the charges in the warrant, but failed to do so; that he was given notice and reasonable opportunity consistent with the nature of the proceedings to have the government witnesses cross-examined in the deposition-taking. Then we shall show that procedural due process in a deportation hearing does not necessarily require the right to confront a witness who is far removed from the place of inquiry; and, finally, that, in this case, the use of deposition testimony was in accord with concepts of due process.

I

THE RECORD ESTABLISHES THAT PETITIONER WAS IN FACT ACCORDED EVERY OPPORTUNITY TO DEFEND THE CHARGES AGAINST HIM, TO HAVE GOVERNMENT WITNESSES CROSS-EXAMINED, AND TO MEET THEIR TESTIMONY WITH REBUTTAL TESTIMONY

Since petitioner's arguments are predicated on the assumption that his order of deportation was

[4] *Betts* v. *Brady*, 316 U. S. 455; *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233.

the product of a series of hearings fatally infected by the use of what he terms "ex parte depositions" to prove the critical issue of past membership in the Communist Party of the United States, and that he was given no proper opportunity to meet such testimony in a manner consistent with procedural fairness, it is appropriate to review at the outset the history of the proceeding which culminated in the order of deportation. Such a review demonstrates that petitioner had every opportunity to have the deposition witnesses cross-examined, and that his failure to have counsel represent him at the deposition-taking or to make other arrangements consistent with the nature of the proceeding was at his own election.

The proceedings before the Immigration and Naturalization Service were commenced on October 31, 1950, with the issuance of a warrant of arrest. At this time petitioner was represented by competent counsel who had been appearing in his behalf in a series of hearings before the Service under a prior warrant issued over a year before and who was familiar enough with his case to institute habeas corpus proceedings in the district court, within four days after petitioner's arrest, to challenge the legality of his detention without bail.

When the first of four deportation hearings was convened on November 22, 1950, petitioner immediately sought the first of a number of con-

tinuances to prepare a defense which never ultimately materialized. This was denied pending some showing by the government of the evidence it would produce and to avoid the prolongation of petitioner's detention. When petitioner was called to the stand, he would not even state his name on the ground that he was unprepared to do so, and his counsel indicated that he would take the same position as to all other questions asked him. When he was asked questions concerning his past Communist Party membership, he refused to answer both on that ground and on the claim of privilege against self-incrimination. Documents were admitted into evidence which established his identity and the fact of his alienage (both of which he later conceded), and the only material matter left for proof was the fact of his past membership in the Communist Party while residing in Hawaii some years before—a charge he neither then nor subsequently affirmed or denied.

The examining officer (presenting the case for the Service) then moved to take the depositions of four witnesses living in Honolulu, explaining that they were residents of Hawaii and that the government expected to adduce testimony through them bearing on the fact of past Communist Party membership. Petitioner's counsel renewed his objection of unpreparedness and his attack on the legality of the hearing. He was given the opportunity to enlarge upon his ob-

jections in a written brief but failed to do so. What is here significant is that petitioner's counsel made no suggestion that his client was unable to afford either to send him to Hawaii or to retain associate counsel in Hawaii. Neither did he suggest that petitioner desired to go there for the deposition taking. He did not make any specific showing that it was necessary that he confront the witnesses there. Counsel's objection was merely that the examining officer had "not offered to have counsel or the respondent or both present at the Government's expense" (R. 118).

Whether the examining or the hearing officer was aware that petitioner, through his then counsel, had previously objected to the transfer of a deportation hearing to Hawaii does not appear from the record. However, they obviously knew that this hearing was scheduled to be held in California, and that there was no motion by petitioner to transfer the entire hearing to Hawaii, where the witnesses were. The hearing officer could reasonably assume that the witnesses in Hawaii, far removed from the place of the hearing, would not appear and testify except under the compulsion of a subpoena. The very nature of the issues and the kind of testimony sought buttresses this assumption. Whether or not an administrative subpoena could have been effectively used to compel these witnesses to travel from Hawaii to Los Angeles poses both legal and practical problems which must have been appar-

ent to the hearing officer who decided against such procedure. Aside from the expense involved, it is clear that to compel witnesses to leave their homes and occupations and travel several thousand miles might well produce situations of individual hardship. Some witnesses under such circumstances, either because of age or ill health, might be precluded from attending. Others might require postponement for various reasons; still others might be recalcitrant and refuse to attend. And since the Service has no power to enforce its subpoenas except through resort to court enforcement proceedings, longer delays might have extended still further the period during which the hearing was pending and the petitioner was being held without bail. The hearing officer was therefore justified in permitting the use of the normal procedure for obtaining the testimony of distant witnesses, *i. e.,* by formal depositions.

Subsequently, on December 7, 1950, both petitioner and his counsel were served with notice of the taking of the depositions in Honolulu on December 18th and 19th. This notice was met with complete silence. The record indicates that petitioner was in communication with a law firm in Honolulu about the case, and that at one point it was contemplated that such firm would represent petitioner at the deposition taking. See p. 9, *supra.* However, at the time of the deposition proceeding in Honolulu, one of the partners

told the Service officer that, although he had contemplated entering an appearance for petitioner, he would not do so and would not be present to cross-examine the deponents. Up to the time the depositions were taken, there was no indication from petitioner that he was unable to have counsel of his choice present at the proceedings, nor was there any unequivocal request that he be allowed to attend himself. And there was no showing that the matter could not be adequately handled by local Honolulu counsel.

After it was noted of record that petitioner and his counsel had both been notified of the deposition taking, the questioning by a Service examining officer was conducted before a hearing officer who presided over the Honolulu deposition proceedings.

The transcript of the depositions was sent to petitioner's counsel on January 22, 1951, with a request that cross interrogatories be prepared and submitted. There was still no response from petitioner's counsel despite continued efforts to reach him. On March 13, 1951, the deportation hearing was convened for the second time in California. Despite the fact that petitioner's counsel had had the transcript of the depositions for several weeks, his motion for a continuance was granted so that he and petitioner might study the testimony and decide whether to submit cross interrogatories. There was still no suggestion by petitioner that he had been or was at that time

unable to procure counsel in Honolulu to conduct an adequate cross-examination of the witnesses there.

On March 28, 1951, when the deportation hearing was resumed, no cross interrogatories had been prepared. Petitioner's counsel objected to the introduction of the depositions, not on the ground that his client had been unable financially or otherwise to have the Honolulu witnesses cross-examined, but on the ground that the government had failed to assume the burden of transporting petitioner and his Los Angeles counsel to Honolulu to confront the witnesses there. The hearing officer replied that the government has no such burden, and overruled the objection on that ground. In a later colloquy petitioner's counsel said it would have been "impractical" for an attorney other than his Los Angeles counsel to have conducted the cross-examination in Honolulu without petitioner's presence and assistance, but he did not specify the reasons for his conclusion; nor did he explain why cross interrogatories could not now be prepared with petitioner's assistance, on the basis of the deponents' direct testimony. The hearing officer stated that there was no question but that petitioner could have been represented in Honolulu, and the examining officer observed that, had he made any request therefor, petitioner could have been present under guard at the deposition taking.

Petitioner was then recalled to the stand. After admitting his identity and the fact of alienage, he refused to answer all questions relating to past Communist Party membership on the ground of First and Fifth Amendment privileges. He also refused, on the same grounds, to state whether he even knew the four government witnesses. Petitioner's counsel again moved for a continuance to prepare a defense. He stated that he needed time to communicate with Honolulu to ascertain what evidence was available to meet (R. 212) "the import, if not some of the specific statements made by the witnesses" in the depositions. He indicated that he did not know whether some of his evidence would be given through witnesses appearing in Honolulu since he had not yet found such witnesses, but that he presumed he might have evidence to present there. On the strength of these statements, petitioner was granted a continuance so that he might ascertain and state what evidence he wished to present.

At the fourth and final hearing on April 19, 1951, petitioner moved that either the deposition witnesses be brought to Los Angeles, or that petitioner be taken at government expense to Honolulu to be present at a cross-examination of those witnesses. In opposition to this motion, the examining officer stated that the Service does not deem it obligatory to transport witnesses thousands of miles; that, had petitioner requested it, he could have been present at the deposition tak-

ing; and that neither petitioner nor his counsel had seen fit to make such request or to present cross interrogatories so that the witnesses might be cross-examined. The motion was denied. Petioner had no evidence to produce by way of defense. His only further act was to make another of a series of motions for continuance to find a witness to testify as to the real character of the Communist Party of the United States. This motion was properly denied on grounds of irrelevancy.[5]

In his exceptions to the hearing officer's decision, petitioner did not contend that he had not had the opportunity to have the government witnesses cross-examined, nor did he assert that he had been financially unable to procure counsel in Honolulu, or to pay the expenses for himself or his Los Angeles counsel to go to Honolulu. His objection was predicated on the fact that the depositions were taken (R. 66) "without provision being made for the transportation to Hawaii of the respondent or his counsel." It was apparently not until petitioner appeared before the Board of Immigration Appeals in March 1952 (See R. 56), through three new attorneys of record, that he made the assertion that he had been financially unable to have a representative appear for him at the deposition taking. At that time the ad-

[5] The Internal Security Act of 1950 had dispensed with the need for proof as to the nature of the Communist Party. *Galvan* v. *Press*, 347 U. S. 522.

ministrative proceedings had been pending for over two years, due in large measure to petitioner's postponements.

This record justifies several conclusions which in large measure destroy the assumptions on which petitioner bases his legal arguments. In the first place, the two witnesses whose testimony was deemed to establish the fact of Communist Party membership as charged in the warrant were not cross-examined only because petitioner elected not to be represented by counsel at the deposition-taking in Honolulu. Petitioner did not claim that he was unable to employ counsel to represent him there. He did not unequivocally declare that he desired to be allowed to attend the Honolulu proceedings personally. Aside from the flat statement that it was impractical to be represented by Hawaiian counsel, he made no showing to such effect. In fact it was not until after the depositions were actually taken that he specified the real basis of his objection, and then it was, not that he had been denied the opportunity to be represented at the proceedings to cross-examine the witnesses, but that the government had failed to *confront* him with the witnesses, which procedure he claimed as a matter of right.[6] Although he persistently characterizes

[6] We have throughout our argument used the term "confrontation" in the sense that petitioner uses it, *i. e.* (Pet. Br. 57), "Mandatory, Secured Right of Presence of the Accused". It should be noted, however, that the term is

the depositions as "ex parte", they were "ex parte" only in the sense that petitioner, having been afforded the opportunity to have counsel represent him, chose not to have the witnesses cross-examined.

The record refutes petitioner's contention that he was subjected to a "total trial in absentia." Not only was he given the opportunity to cross-

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often used in a broader sense in civil practice to mean opportunity for cross-examination, a privilege granted petitioner in this case. This use of the term is discussed by Professor Wigmore as follows (V Wigmore, *Evidence* (3d ed., 1940) Sec. 1365, p. 27):

"CROSS-EXAMINATION AND CONFRONTATION. The essential requirement of the Hearsay rule, as just examined, is that statements offered testimonially must be subjected to the test of Cross-examination. But a process commonly spoken of as *Confrontaiton* is also often referred to as an additional and accompanying test or as the sole test.

"Now Confrontation is, in its main aspect, *merely another term for the test of Cross-examination.* It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, *i. e.* it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable.

"The details of this distinction are elsewhere to be examined * * *; it is enough to note here that, as far as confrontation is an indispensable element of the Hearsay rule, it is merely another name for the opportunity of cross-examination."

examine the deposition witnesses through counsel or by means of written interrogatories, both before and after the deposition-taking, but in three subsequent hearings before the hearing officer he was also given the opportunity to interpose objections to the depositions generally, and then to object to the questions and answers one by one. In addition, every opportunity was given him to present rebuttal evidence, which he always promised but significantly never produced. This included a full opportunity to produce for questioning in Hawaii witnesses who his counsel suggested might be available. His only offer of proof during the two years of the administrative proceedings was an offer to produce the national secretary of the Communist Party of the United States to show that that organization did not have the character which Congress deemed it to have in making the fact of membership ground for deportation.

These facts—together with his refusal to either affirm or deny his Communist Party membership, his refusal to identify the deposition witnesses when questioned, his admitted consideration of the feasibility of appointing local counsel in Honolulu and subsequent rejection of such plan as "impractical," and his dilatory tactic of seeking continuances which protracted the proceeding—support the inference that petitioner was less interested in meeting the thrust of the deposition testimony than in attempting to create

a situation on which he could later build an argument of prejudicial error. The weakness of his case before the Service arose, not out of any denial of procedural fairness, but because he elected not to contest on its merits the case against him.

II

SINCE DEPORTATION PROCEEDINGS ARE NOT GOVERNED BY THE CONSTITUTIONAL LIMITATIONS IMPOSED ON CRIMINAL TRIALS, THERE IS NO ABSOLUTE RIGHT THAT THE ALIEN BE PERSONALLY PRESENT WHEN WITNESSES ARE EXAMINED

While petitioner concedes that deportation proceedings are not "to be technically classed as" equivalent "to criminal proceedings" (Pet. Br. 28), the premise of his entire argument is that the analogy is so close as to require that the alien be accorded the same right as an accused in confronting the witnesses against him on "[i]dentical considerations of Constitutional principle" (Pet. Br. 57). On this assumption he draws on the precedent and authority of various criminal cases and criminal law texts (Pet. Br. 28–56), many concerned with Sixth Amendment problems, to prove his contention that the use of depositions in this case violated his right under the Fifth Amendment to due process of law.

This attempt to impose on the deportation process the restrictions which the Constitution impresses on a criminal trial has been foreclosed by well-established precedents of this Court to the contrary. *E. g., Harisiades* v. *Shaughnessy,*

342 U. S. 580, 594–595; *Carlson* v. *Landon,* 342 U. S. 524, 537–538; *Mahler* v. *Eby,* 264 U. S. 32, 38–39; *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 157; *Lewis* v. *Frick,* 233 U. S. 291, 302; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Zakonaite* v. *Wolf,* 226 U. S. 272, 275; *Low Wah Suey* v. *Backus,* 225 U. S. 460, 470–471; *Nishimura Ekiu* v. *United States,* 142 U. S. 651. Deportation is neither a criminal action nor a punishment for crime, but a civil or administrative remedy, committed to the executive arm of government, to rid the country of aliens whose presence Congress has deemed undesirable. Its procedures are administrative (cf. *Marcello* v. *Bonds,* 349 U. S. 302; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33), and, while summary, are adapted to the end sought. *Zakonaite* v. *Wolf, supra* (226 U. S. at p. 275); *The Japanese Immigrant Case* (189 U. S. 86, 100–101). That end is not the infliction of punishment but the "revocation of a privilege voluntarily granted." *Helvering* v. *Mitchell,* 303 U. S. 391, 399.

It is true, of course, that a deportation order, even though not inflicted as a punishment, has such a serious impact on the personal life of an alien that strict adherence to the rules of procedure established for the deportation hearing has been enforced (*Bridges* v. *Wixon,* 326 U. S. 135, 153–154), and a rule of strict construction has been applied in the interpretation of statutes affecting deportation. *Barber* v. *Gonzales,* 347

U. S. 637, 642–643; *Jordan* v. *DeGeorge,* 341 U. S. 223, 231. But this does not justify the assumption that the constitutional guarantees available to an accused in a ~~criminal~~ *criminal* trial are automatically to be transposed to the dissimilar administrative process which governs deportation hearings. As this Court stated in *Zakonaite* v. *Wolf,* 226 U. S. 272, 275, "a proceeding to enforce such regulations [immigration] is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments".

The right of confrontation of witnesses guaranteed the accused in a criminal trial derives, not from any fundamental notions of fairness implicit in the due process secured by the Fifth Amendment to a litigant in any proceeding, but directly from the Sixth Amendment (*supra,* pp. 2–3), which applies by its terms only to "criminal proceedings". This Court so held in *United States v. Zucker,* 161 U. S. 475, where the United States proceeded against importers to recover the value of merchandise under the provisions of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, Sec. 9, charging certain fraudulent practices which resulted in an alleged forfeiture. At the trial the government offered to read into evidence a deposition which had been taken in Paris, France, under letters rogatory, and the defendants objected to the admission of such testimony on the following grounds (*id.* at p. 477):

1. That this action, though civil in form, was in substance a criminal case, and, under the Constitution of the United States, the defendants were entitled on the trial "to be confronted with the witnesses" against them.
2. That "the constitutional right of the defendants to be confronted with the witnesses against them is not secured by giving them notice of the execution of letters rogatory in France, and that their failure to attend on such occasion at a place three thousand miles from the place of trial, out of the district and in a foreign country, does not operate as a waiver of their constitutional right, if it can be waived."

This Court, rejecting these arguments, unanimously held as follows (*id.* at p. 481):

> The Sixth Amendment relates to a prosecution of an accused person which is technically criminal in its nature. * * * The words, in the Sixth Amendment, "to be informed of the nature and cause of the accusation," obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security. So the clause declaring that the accused, in a criminal prosecution, is entitled "to be confronted with the witnesses against him," has no reference to any proceeding (although the evidence therein may disclose, of necessity,

> the commission of a public offence) which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed.

See also *Hepner* v. *United States,* 213 U. S. 103, 109–111, which restated with approval the holding of the *Zucker* case, and *Low Wah Suey* v. *Backus,* 225 U. S. 460, 470–471, where this Court held that the Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor" (*supra.* pp. 2–3) was not a constitutional requisite in a deportation proceeding.

We find no support in the cases cited by petitioner for the proposition that due process of law, particularly due process in the context of an administrative proceeding in deportation, requires a "mandatory right of presence" of the alien whenever any testimony is taken. As we have indicated, the extensive list of criminal cases collected by petitioner (Pet. Br. 31–56) is governed by different constitutional considerations. The cases relating to state insanity (Pet. Br. 76–90) and asexualization proceedings (Pet. Br. 90–96), even if they were otherwise persuasive for petitioner's point, bear scant resemblance to deportation proceedings. They find their authority in state statutes, and involve the private interests of individuals, particularly individuals who are so incapable of protecting their own interests in the proceedings as to require a special type of court supervision. The power of Congress over

the admission of aliens and their right to remain is far broader, touching basic aspects of national sovereignty and problems of national relations. Its exercise is non-judicial in nature and is committed to the executive branch of government for administration. *Galvan* v. *Press,* 347 U. S. 522, 530.

Two circuits have ruled squarely against petitioner's attempt to interject into deportation procedures the right of confrontation secured to an accused in a criminal proceeding. See *Bhagat Singh* v. *McGrath,* 104 F. 2d 122, 123 (C. A. 9), certiorari dismissed, 308 U. S. 629; *Singh* v. *District Director,* 96 F. 2d 969 (C. A. 9); *Berkman* v. *Tillinghast,* 58 F. 2d 621 (C. A. 1). The *Berkman* case involved a factual situation analogous to the instant one except that there, unlike here, the alien made a request that she be taken to the deposition proceeding and that the expenses of local counsel that she could not afford be defrayed. The Court of Appeals for the First Circuit held as follows (58 F. 2d at p. 622):

> The Hynes evidence was objected to on the ground that, although the petitioner was notified when and where the deposition would be taken, the government refused her request to be sent to Los Angeles to be present personally at the taking of it, and she was unable by reason of poverty to be represented by counsel. As deportation proceedings are civil in their nature, it is not essential that the defendant should be

> confronted by the witnesses; evidence may be obtained by deposition. The testimony of Lieutenant Hynes was taken in a manner which amounted to an open commission with due notice to the opposite party. It was the duty of the government to see that the witness was fairly and fully examined. In administrative proceedings the government officials are not mere prosecutors, but are under a strict duty to see that the interests of the accused person are properly safeguarded. This did not, however, preclude them from taking testimony at a distance, nor, if they did so, impose upon the government the burden, either of transporting the defendant to the place where the witness was examined, or of paying counsel to represent her there. The testimony of Lieutenant Hynes appears to have been fairly taken. No suggestion has been made for the petitioner of anything favorable to her side which might have been brought out and was not. The printed and documentary exhibits were promptly shown to the petitioner or her counsel, and she was afforded an opportunity to meet them.

The specific problems of procedural fairness in this case are further discussed below (pp. 65–70, *infra;* see also pp. 29–41, *supra*). Our point here is that the courts have rejected, and should reject, petitioner's basic premise that there is in deportation proceedings *an absolute right of confrontation* such as pertains in criminal cases. Deportation has always been deemed an admin-

istrative rather than a judicial process. Cf. *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 157; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275; *The Japanese Immigrant Case*, 189 U. S. 86, 100–101. Whether petitioner was accorded "due process of law" depends, not on whether his hearing was conducted "according to the forms of judicial procedure" in criminal cases, but on whether the administrative hearings followed procedures "that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which [administrative] officers are required to act". *The Japanese Immigrant Case, supra* (189 U. S. at pp. 100–101). The use of deposition testimony has, as we show below, always been recognized as a fair method of procedure in both administrative and civil judicial proceedings. There is, therefore, no constitutional bar to the use of such testimony in deportation proceedings.

III

THE USE OF DEPOSITION TESTIMONY IN DEPORTATION PROCEEDINGS IS IN ACCORD WITH DUE PROCESS

In the absence of an absolute right of confrontation in deportation cases, petitioner's general argument against the use of depositions must fail. The standard of due process in a deportation hearing is the standard of fundamental fairness, and there is nothing unfair in the use of

deposition evidence with full right of cross-examination such as was afforded petitioner in this case.

A. THE USE OF DEPOSITION TESTIMONY HAS LONG BEEN RECOGNIZED AS A FAIR METHOD OF PROCEEDURE

In the trial of civil actions, proof of the issues through depositions has been historically recognized as valid. In fact, the first Congress, in the Judiciary Act of September 24, 1789 (Sec. 30, 1 Stat. 73, 88–90), provided for the taking of depositions *de bene esse* of witnesses living at a distance greater than one hundred miles and under other circumstances of unavailability. Cf. *Whitford* v. *Clark County*, 119 U. S. 522; *Patapsco Insurance Co.* v. *Southgate*, 5 Pet. 604, 616–617; *The Argo*, 2 Wheat. 287; *Pettibone* v. *Derringer*, 4 Wash. C. C. R. 215, 219; *United States* v. *One Case of Hair Pencils*, 1 Paine's C. C. R. 400. The conditions under which deposition testimony could be taken for evidentiary use, originally prescribed in the 1789 statute, are now set out in Rule 26 (d) of the Federal Rules of Civil Procedure.[7] Under

[7] "*Use of depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

* * * * *

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

this Rule depositions can be used against "any party who was present or represented at the taking of the deposition or *who had due notice thereof* * * *" (emphasis added). The rules governing the taking and use of depositions (Rules 26–33, F. R. Civ. P.) do not, of course, provide any inflexible formula which must be applied in all cases in the same manner. If a litigant feels that he may be oppressed by the taking of a deposition he may move the court to limit the examination in some reasonable way, and the court has a certain area of discretion to do so. Rule 30 (b) and (d). Cf. *Hyam* v. *American Export Lines,* 213 F. 2d 221 (C. A. 2); *Gitto et al.* v. *"Italia", Societa Anonima Di Navigazione,* 28 F. Supp. 309 (E. D. N. Y.). However, such relief must be applied for by the party affected, and a plea for modification must be supported by some reasonable showing to justify it.

The use of depositions in administrative proceedings is no more circumscribed. Provision is

1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

made in Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) that a presiding officer can "take or cause depositions to be taken whenever the ends of justice would be served thereby". This broad grant leaves the details of administration to the discretion of the administrators to an even greater extent than do the Federal Rules of Civil Procedure, and provides that flexibility which is an essential of the administrative process. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143. Unlike the situation in judicial litigation, where the parties themselves procure the taking of depositions, Section 7 gives the presiding officer the power, to be exercised under such conditions as are appropriate to the facts of the particular hearing.[8] Manifestly, if there are specific reasons why a party

[8] Other statutory provisions granting the power to hearing officers in administrative proceedings do likewise. See 5 U. S. C. 498 (Dept. or Interior); 5 U. S. C. 118k (d) (Civil Service Commission); 7 U. S. C. 499m (d) (Perishable Commodities Act); 7 U. S. C. 1603 (Federal Seed Act); 8 U. S. C. 1443d, 1446 (b) (Immigration and Nationality Act of 1952 (naturalization proceeding)); 15 U. S. C. 49 (Federal Trade Commission Act); 15 U. S. C. 155 (China Trade Act); 15 U. S. C. 717m (Natural Gas Act); 16 U. S. C. 825F (Federal Power Act); 19 U. S. C. 1333 (d) (Tariff Act); 22 U. S. C. 1623 (d) (International Claims Act); 25 U. S. C. 70q (Indian Claims Act); 26 U. S. C. 1114 (Tax Court); 29 U. S. C. 161 (National Labor Relations Act); 30 U. S. C. 475 (j) (Coal Mine Safety Board of Review); 33 U. S. C. 927 (Longshoremen's and Harbor Workers' Comp. Act); 35 U. S. C. 23–24 (Patent Act); 47 U. S. C. 409 (h) (Federal Communications Commission Act); 49 U. S. C. 12 (Interstate Commerce Act); 49 U. S. C. 459, 644 (Civil Aeronautics Act).

deems the use of depositions unfair in a particular case, it is incumbent on such party to make his showing. In the absence of a showing, the deposition procedure is the usual and normal method of taking the testimony of distant witnesses in both judicial and administrative proceedings.

B. THE USE OF DEPOSITION TESTIMONY WAS AUTHORIZED BY THE REGULATIONS GOVERNING DEPORTATION HEARINGS

While petitioner does not claim that the use of depositions was unauthorized by the regulations that governed his deportation hearings, we think it well to point out that the published regulations applicable to petitioner's case explicitly and clearly authorized the use of deposition testimony. The hearings in this case were all conducted between November 22, 1950, and April 19, 1951, and the order of deportation was handed down on August 1, 1951. The governing procedures were, therefore, those prescribed in the regulations of November 10, 1950, promulgated under authority of the Immigration Act of 1917, as amended (15 Fed. Reg. 7637–7639). Those regulations embodied significant changes in procedures of the Immigration and Naturalization Service to bring deportation hearings into conformity with procedures followed by other agencies of the government, and to insure a higher degree of fairness than had previously obtained, but the Service's procedures continued, as they had for years, to authorize and contemplate the use of statements and depositions.

Before 1950, the differentiation between the investigative and the adjudicative functions of the Service had not been clearly defined. The investigating officer was entitled to interrogate under oath or affirmation not only the alien but others, and to record such testimony for possible use in a future hearing (8 C. F. R. (1949 ed.) 150.1).[9]

At the hearing, the presiding inspector (who, in some instances, was both the advocate for the government and the adjudicator in the same case) was given broad latitude both as to the evidence

[9] This power was derived from Section 16 of the Immigration Act of 1917, as amended (39 Stat. 889, 58 Stat. 714, 8 U. S. C. (1946 ed.) 152). Section 16 gave immigration inspectors authority to administer oaths and "to take and consider evidence touching the right of any alien to * * * reside in the United States, and, where such action may be necessary, to make a written record of such evidence * * *." The concomitant power was also given district directors and inspectors in charge "to require by subpoena the attendance and testimony of witnesses before said inspectors * * * touching the right of any alien to * * * reside in * * * the United States * * *." See *United States* v. *Minker*, No. 35, this Term, decided January 16, 1956; *United States* v. *Vivian*, 224 F. 2d 53 (C. A. 7), certiorari denied January 23, 1956, No. 322, this Term; *Loufakis* v. *United States*, 81 F. 2d 966 (C. A. 3); *Graham* v. *United States*, 99 F. 2d 746 (C. A. 9); see also *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 54 (dissenting opinion of Mr. Justice Reed).

Prior to 1917, there was no compulsory process by which the testimony of witnesses could be obtained, and this Court in *Low Wah Suey* v. *Backus*, 225 U. S. 460, 470–471, held that such provision was not a constitutional requisite in deportation proceedings.

which could be admitted, and the evidence which, after admission, he could consider as having probative value in arriving at his findings. Recorded statements obtained during investigations were admissible under the following circumstances (*id.*, 150.6 (i)):

> *Use of statements or admissions made during investigation.* A recorded statement made by the alien (other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation. An affidavit of an inspector as to the statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable in person.

See p. 627, *The Immigration and Naturalization Systems of the United States,* S. Rep. No. 1515, 81st Cong., 2d Sess. In other instances where government witnesses were unavailable, their ex parte statements could be admitted and given evidentiary weight, subject only to the necessary recognition that such evidence was procured with-

out opportunity for cross-examination.[10] A limitation on this authority was that where such evidence was used, it was incumbent to show that the maker of the statement could not reasonably be produced. Cf. *Navarrette-Navarrette* v. *Landon,* 223 F. 2d 234 (C. A. 9), pending on petition for a writ of certiorari, No. 201 Misc., this Term; *United States ex rel. Impastato* v. *O'Rourke,* 211 F. 2d 609 (C. A. 8), certiorari denied, 348 U. S. 827; *Kishan Singh* v. *District Director,* 83 F. 2d 95 (C. A. 9), certiorari denied, 299 U. S. 561. And because a Service regulation required it, it was mandatory that a recorded statement taken before the hearing must have been taken under oath, thus insuring "an important safeguard—the fear of prosecution for perjury." *Bridges* v. *Wixon,* 326 U. S. 135, 153.

While the regulations prior to 1950 did not grant specific authority to the Service to take depositions of absent witnesses (as opposed to sworn statements and affidavits), it was well settled that the Service had such power, derived from its authority to administer oaths and to issue

[10] See *Kishan Singh* v. *District Director,* 83 F. 2d 95 (C. A. 9), certiorari denied, 299 U. S. 561; *United States ex rel. Ng Wing* v. *Brough,* 15 F. 2d 377 (C. A. 2); *United States ex rel. Diamond* v. *Uhl,* 266 Fed. 34 (C. A. 2); *Choy Gum* v. *Backus,* 223 Fed. 487, 493 (C. A. 9). Cf. *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 157. Some of the problems presented where ex parte statements and hearsay evidence were relied on to establish deportation charges without opportunity for cross-examination are discussed in a study made by the Secretary of Labor's Committee on Administrative Procedure, entitled *The Immigration Service* (Dept. of Labor Mimeograph, 1940, at pp. 87–89).

subpoenas under Section 16 of the 1917 Immigration Act (*supra,* p. 53, fn. 9).[11] The duty of the Service to allow counsel to be present at the taking of such depositions was recognized, but it was also recognized—as shown in Point II, *supra*—that the Service was not obliged to send either the alien or his counsel to the deposition proceeding at government expense, or to provide for the confrontation of the deponents by the alien. *Berkman* v. *Tillinghast,* 58 F. 2d 621 (C. A. 1); *Bhagat Singh* v. *McGrath,* 104 F. 2d 122 (C. A. 9), certiorari dismissed, 308 U. S. 629; *Singh* v. *District Director,* 96 F. 2d 969 (C. A. 9); *Kishan Singh* v. *District Director,* 83 F. 2d 95 (C. A. 9), certiorari denied, 299 U. S. 561; Section 756.8, *Immigration Manual* (Government Printing Office, 1946). And while it was required that the alien be notified of the time and place of the deposition proceedings, it was not considered fatal if the alien was unable to attend personally or to send counsel. Section 756.8 (b), *Immigration Manual, supra.*

Following this Court's decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950), holding that the administrative hearings in proceedings for the deportation of aliens must conform to the

[11] The subpoena power was exercised at the request of the alien where he could show that he had made diligent effort to produce the evidence otherwise and could also show the materiality of the evidence he hoped to produce. Sections 756.8, 982–984, *Immigration Manual* (Government Printing Office, 1946).

requirements of the Administrative Procedure Act, and that the commingling of the accusatory and adjudicative functions in one presiding inspector was in violation of that Act, regulations (15 F. R. 1297–1302, March 10, 1950) were promulgated to meet the standards of the Administrative Procedure Act.

When, thereafter, Congress, in a rider to the Appropriation Act of September 27, 1950, 64 Stat. 1048, exempted deportation hearings from the procedural requirements of the Administrative Procedure Act,[12] new regulations were enacted (see 15 F. R. 7637–7639) to be effective as of November 10, 1950, which in large measure retained the procedural reforms initiated in the March 1950 regulations and later incorporated into the Immigration and Nationality Act of 1952. These were the regulations in effect at the time of petitioner's hearing.

Under these regulations, a "hearing officer" was provided to conduct the hearing (8 C. F. R. (1951 Supp.) 151.1), who would take no part in case preparation but would function as an adjudicator. His duties in regard to the conduct of the hearing were spelled out in some detail,[13]

[12] *Marcello* v. *Bonds*, 349 U. S. 302, 306, 312; Besterman, *Commentary on the Immigration and Nationality Act*, Title 8, U. S. C. A. (1953 ed.), pp. 48–50.

[13] 8 C. F. R. (1951 Supp.) 151.2 provided in pertinent part:

"(b) *Hearing Officer; general duties.* The hearing officer shall conduct a fair and impartial hearing. He shall use his independent judgment in rendering his decision and shall

as were those of the examining officer.[14] In addition, the hearing officer was given the following

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not perform any duties inconsistent with the duties and responsibilities of an adjudicating officer, except as provided in this part. He shall certify that to the best of his knowledge and belief the record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record. The hearing officer shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. He may, within his discretion, exclude from the record any arguments in support of objections, but, in such event, the alien or his counsel or representative may submit argument in the form of a brief to accompany the record.

"(c) *Hearing officer; specific duties.* At the commencement of the hearing under the warrant of arrest, the hearing officer shall (1) place the alien under oath or affirmation, (2) enter of record a copy of the warrant of arrest and explain to the alien in simple, understandable language the nature of the charges contained therein, and (3) advise the alien, if not represented by counsel or other qualified representative, that he may be so represented if he desires and require him to state then and there for the record whether he desires such representation. * * *"

[14] 8 C. F. R. (1951 Supp.) 151.2 (f) provided in pertinent part:

"* * * The examining officer shall in such cases conduct the interrogation of the alien and of the witnesses on behalf of the Government and the examination or cross-examination of the alien's witnesses, present all available evidence bearing upon the alien's liability to deportation, lodge such additional charges as he may find to be applicable, and, if the alien has applied for relief from deportation, inquire thoroughly into the alien's statutory eligibility for such relief. The hearing officer in such cases shall exercise all his regular functions not herein assigned to the examining officer, and he may, in addition, take such part in the interrogation of the alien and witnesses as he may deem necessary to assure that a full and proper hearing is held."

specific powers in connection with the hearing (8 C. F. R. (1951 Supp.) 151.2 (a)):

> *Conduct of hearing*—(a) *Hearing officer; general powers.* The officer assigned to conduct the hearing under a warrant of arrest shall be referred to as the "hearing officer". He shall have authority to (1) administer oaths and affirmations, (2) issue, during the course of the hearing, any subpenas authorized by law, (3) conduct the hearing and rule upon all objections to the introduction of evidence or motions made during the course of the hearing, (4) *take or cause depositions to be taken,* (5) make decisions in accordance with § 151.5, (6) grant voluntary departure or preexamination pursuant to § 150.3 of this chapter, or both, and (7) take any other action consistent with applicable provisions of law and regulation [emphasis added].

Since the language of Regulation 151.2 (a) was largely taken from Section 7 of the Administrative Procedure Act (5 U. S. C. 1006 (b)), as had been its counterpart in the regulations of March 1950, it is apparent that the exercise of the powers enumerated therein was intended to be governed by standards appropriate to the administrative process generally (as contrasted to court procedures). Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 141–144. This is also evidenced by the fact that, at the same time that the power was given the hearing officer to take or cause depositions to be taken, pro-

vision for the use of ex parte statements obtained during examination was not only continued in the regulations but was broadened in its scope.[15] Hearing officers were given broad latitude in both the kind of evidence they could admit and the evidence they could consider as having probative value, the only expressed restriction being that such evidence could not be "irrelevant, immaterial, or unduly repetitious" (8 C. F. R. (1951 Supp.) 151.2 (b)).[16] Since the hearing officer assumed an impartial status in the new procedural scheme, he was free within a reasonable area of discretion, not only to shape the procedures to meet the problems of the case, but to determine the best

[15] Under the caption "contents of record—evidence" it was provided (8 C. F. R. (1951 Supp.) 151.3):

"(b) *Use of statements made during course of investigation.* The hearing officer may enter of record any written or recorded statement or satisfactory evidence of any admission made by the alien or any other person during the investigation. If objection thereto is made by the alien or his counsel or representative, the reasons for the objection, as well as the ruling thereon by the hearing officer, shall be made a part of the record.

"(c) *Affidavit.* In cases in which an affidavit in narrative form has been made by an alien prior to the issuance of a warrant of arrest as provided in § 150.1 (c) of this chapter and such affidavit satisfactorily establishes the facts necessary for determination as to deportability, the hearing officer may enter the affidavit as an exhibit of record and it may be used as the basis for the decision in the case."

[16] This standard for the admissibility of evidence in deportation hearings was taken from Section 7 (c) of the Administrative Procedure Act (5 U. S. C. 1006 (c)). Cf. *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 690–691 (C. A. 9), certiorari denied, 338 U. S. 860.

available method of proving a particular fact either by way of establishing or refuting the case against the alien. Cf. *Cella* v. *United States*, 208 F. 2d 783, 789 (C. A. 7), certiorari denied, 347 U. S. 1016.

If, for example, a witness whose statement had been taken during investigation was not to be found at the time of hearing, the hearing officer could, as before, admit the statement into evidence, subject to the infirmities that such statements have, especially those taken without opportunity for cross-examination. 8 C. F. R. (1951 Supp.) 151.3. If the witness was available and was present in the vicinity of the hearing, the hearing officer, could, of course, either invite him to attend or procure the issuance of a subpoena to compel his attendance to testify under Regulation 151.2 (a), *supra*.

In many cases, however, witnesses are far distant from the place of hearing, as in the instant case, and it is highly improbable that they would appear at the hearing by invitation. Whether or not such witnesses could reasonably be compelled to travel a great distance under the compulsion of subpoena, it is apparent that such procedure, almost inevitably necessitating resort to court enforcement and protracted litigation in the courts as to each witness (cf. *United States* v. *Vivian*, 224 F. 2d 53 (C. A. 7), certiorari denied January 23, 1956, No. 322, this Term), would extend the time involved in a deportation proceeding

far beyond its present limits. On the other hand, the impossibility of holding a separate hearing in each distant place where a government witness is present is equally apparent. To meet this situation, the hearing officer was specifically given authority under Regulation 151.2 (a) to have the deposition of a witness (either for the government or the alien) taken in lieu of other ~~from~~ some of proof.

While the power to take or cause depositions to be taken was delegated to hearing officers without specifying the precise steps to be followed where the witness was, as in the instant case, far removed from the place of hearing, and in another immigration district, the governing regulations were flexible enough to allow some reasonable latitude.[17] In practice, when it appeared

[17] The provisions contained in the 1950 regulations granting the power to hearing officers to take or cause depositions to be taken have been carried over into the 1952 regulations (8 C. F. R. (1952 rev.) 242.52), and in addition there is now the following provision specifically applicable to the situation involved in this case (8 C. F. R. (1952 rev.) 287.4):

"* * Upon determining that a witness whose evidence is desired either by the Service officer or the alien or other party affected will not appear and testify or produce documentary evidence unless commanded to do so and that the testimony and evidence of such witness is essential, the district director, officer in charge, or a special inquiry officer, in any proceeding pending before him, shall issue a subpena. If the witness is at a distance of more than 100 miles from the place of hearing, the subpena shall provide for the witness' appearance at the field office nearest to him to respond to oral or written interrogatories, unless the Service indicates that there is no objection to bringing the witness the distance required to enable him to testify in person at the hearing."

Compare Rule 26 (d) (3), F. R. Civil P.

that the testimony of a witness was required at the hearing, the hearing officer could apply through the Central Office of the Immigration and Naturalization Service for the issuance of an administrative subpoena, which was subsequently issued by the director of the particular district where the witness resided, requiring him to appear at the field office nearest to him to give testimony under oath administered by a hearing officer. If a witness failed or refused to obey such process, compliance could be secured by the Service through application for a court order to the United States district court in that jurisdiction. See 8 U. S. C. (1946 ed.) 152.

While such provision for depositions paralleled the existing practice in civil judicial proceedings, there was one significant difference. The hearing officer who presided at the deposition-taking was more than a mere notary. He could, through intervention in the questioning, protect the interests of the party against whom the deposition was being taken and could, where necessary, develop any issue which needed clarification or amplification to the end of securing a complete record of the testimony.

Implicit in the power given to take or to procure the taking of depositions was the right of the other party to have his counsel cross-examine the witness. *Bhagat Singh* v. *McGrath*, 104 F. 2d 122 (C. A. 9). As before, there was no provision in the regulations which granted the alien

any absolute right of confrontation of witnesses either where depositions were employed or otherwise, and no provision was made that the Service sustain the expense of transporting either the alien or his counsel to the place of the taking. Compare *Berkman* v. *Tillinghast, supra* (58 F. 2d 621); *Bhagat Singh* v. *McGrath, supra* (104 F. 2d 122); *Singh* v. *District Director, supra* (96 F. 2d 969); *Kishan Singh* v. *District Director, supra* (83 F. 2d 95); *Weinbrand* v. *Prentis,* 4 F. 2d 778 (C. A. 6).

This detailed review of the regulations shows that the use of deposition testimony has consistently been recognized as a proper method of proof in deportation hearings, as in other administrative and civil judicial proceedings. Inasmuch as the use of true ex parte statements, under special circumstances, has been held not to render deportation hearings unfair (see cases cited, *supra,* p. 55), it is evident that the use of formal deposition testimony, where there is full opportunity for the witness to be cross-examined by counsel, does not violate any general concepts of fairness.[18]

[18] The opportunity to cross-examine is tantamount to actual cross-examination (V Wigmore, *Evidence* (3d ed., 1940), Sec. 1371, pp. 51–53). It is well-established that a person can waive his right to be represented by failure or refusal to exercise it. *Moncado* v. *Ramsey,* 167 F. 2d 191 (C. A. 8); *United States ex rel. Karpathiou* v. *Schlotfeldt,* 106 F. 2d 928, 929 (C. A. 7); *Bhagat Singh* v. *McGrath,* 104 F. 2d 122 (C. A. 9); *Channan Singh* v. *Haff,* 103 F. 2d 303 (C. A. 9);

There may be instances where an order to take depositions in an administrative proceeding will produce individual hardship. Both the regulation here involved and Section 7 of the Administrative Procedure Act provide sufficient latitude to the presiding officer to take care of such special circumstances on a case-by-case basis. However, if a party to a proceeding feels that an order to take depositions would produce some extraordinary disadvantage to him, it is at least incumbent on him so to state so that the order may be modified by the hearing officer accordingly. No less is required in a civil proceeding (see *supra*, p. 50).

IV

NO CIRCUMSTANCES PECULIAR TO THIS CASE RENDERED THE USE OF DEPOSITION TESTIMONY A DENIAL OF DUE PROCESS

As shown in Point I, petitioner never in the course of the deportation hearing advanced any argument to show that the use of depositions

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Kishan Singh v. *Director*, 83 F. 2d 95 (C. A. 9), certiorari denied, 299 U. S. 561; *Berkman* v. *Tillinghast*, 58 F. 2d 621 (C. A. 1); *Ranieri* v. *Smith*, 49 F. 2d 537 (C. A. 7), certiorari denied, 284 U. S. 657; *United States* v. *Goldstein*, 271 Fed. 838, 845–846 (C. A. 8); *United States ex rel. Diamond* v. *Uhl*, 266 Fed. 34, 40 (C. A. 2). The principle of waiver is certainly no less applicable to the administrative than it is to the judicial process. Even an accused in a criminal proceeding may waive his constitutional right to be represented. *Johnson* v. *Zerbst*, 304 U. S. 458, 464.

Since petitioner had the *opportunity* to be represented but voluntarily waived it, he was accorded the protection to which he was entitled under the regulations.

would produce any special or unusual hardship in his case nor did he advance any reason to support his statement that it would be impractical to have counsel represent him in Honolulu. He rested on the broad contention that the Service was required as a matter of right to transport him and his Los Angeles counsel to Hawaii, and this despite the fact that petitioner, through the same counsel, had previously opposed the transfer of the hearings to Hawaii. In the judicial proceedings, however, and in particular before this Court, petitioner has cited several factors which he now contends rendered the use of deposition testimony unfair in this case.

He lays stress on the fact that the witnesses were unable to see him for identification purposes (Pet. Br. 98). While this fact might be highly relevant if there were a close and disputed question of identity, it has no special significance in this case since petitioner admitted his identity and there is not even a suggestion in the deposition transcript that the witnesses might have confused petitioner's passport picture (which petitioner himself identified at the hearing, R. 205–206) with anyone else's. The two witnesses whose testimony was credited with establishing the fact of past Communist Party membership expressed no doubt in identifying him as the person whom they had known as a party member and whose picture was shown to them. These witnesses covered not only the undisputed point

of identity, but gave definite testimony as to meetings, conversations, and other activities proving petitioner's active role of leadership in the Communist Party (*supra*, pp. 9–10). Petitioner not only failed to raise the issue of possible mistaken identity at the hearing, but he claimed the privilege against self-incrimination when asked to state his knowledge of the deponents. Whatever potential dangers may be involved in the use of depositions in a judicial or administrative proceeding where identity is really in issue, this is not such a case.

Petitioner also emphasizes the fact that all of the affirmative evidence as to his past membership in the Communist Party was developed through depositions without securing to him his asserted "right of presence". As we have already demonstrated, however, the depositions were taken with full opportunity given him to have the witnesses cross-examined, and otherwise in compliance with the governing regulations and administrative due process. They would thus constitute proper affirmative evidence at any judicial trial. And if the depositions were valid as evidence at all, they could be the basis for establishing the fact of past membership without more. The task of weighing and evaluating the evidence in a deportation proceeding is one for immigration officers whose determinations on questions of fact are made final by statute, and "[t]hey are free, within reason and fairness, to fol-

low their own views as to what has probative value on the issue presented". *Singh* v. *District Director,* 96 F. 2d 969, 971 (C. A. 9). And see *Vajtauer* v. *Commissioner,* 273 U. S. 103, 106. The final determination of the immigration officers is even less vulnerable to collateral attack where, as here, the alien has failed to present any rebuttal evidence whatsoever, and has not even denied the warrant charges.

Although he makes no special issue of it, petitioner stresses the fact that he was in the custody of the Service during the hearings in support of his argument that the Service should have "secured" his presence at the deposition-taking (Pet. Br. 97). This Court, however, in *Carlson* v. *Landon,* 342 U. S. 524 (to which this petitioner was a party), sustained the authority of the Service to hold him without administrative bail, and there can be no question that at all times he was being legally detained. His detention, therefore, has relevance to his argument only on the assumption that he had an absolute right to be present at the taking of the depositions, and was prevented from attending because of the refusal of the Service to allow him to be present. But such was not the case. As we have shown, he had no right of confrontation under the applicable laws, and he made no suggestion that he be given the opportunity to attend at his own expense. Since the examining officer stated on the record

that he would have been allowed to attend had he made any such request, it cannot be assumed that the Service did anything which could have prejudiced his case or would have created any improper obstacle to his going to Hawaii.

Petitioner did not before the Service and does not now point to any specific facts which rendered his presence necessary. As we have shown above, there was no issue of identity in this case. Not only could counsel have cross-examined the witnesses at the deposition proceedings, but petitioner was given additional time to seek cross-examination by interrogatories or direct questioning after he had opportunity to study the direct testimony. Under these circumstances, the hearing officer, to whom the regulations have delegated the function of conducting the hearing, did not act arbitrarily in ordering that the depositions be taken, and that is the real issue here.

Petitioner suggests that proof of the issues in deportation through deposition testimony should be forbidden where the testimony given is "within the area of the First Amendment" (Pet. Br. 108–109). However, the cases he cites in support of this proposition go to the issue of whether particular laws place unconstitutional restrictions on speech and assembly as a substantive matter. They do not impress any special procedural standards on the trial or hearing of such matters.

Finally, petitioner cites the hardships that will be entailed in his deportation both to himself and

his family (Pet. Br. 98–100). These considerations, however real, do not bear on the legal issues he presents, and are addressed to matters of congressional policy rather than judicial intervention on collateral attack. Cf. *Galvan* v. *Press,* 347 U. S. 522, 531. They do not establish the invalidity of standard modes of procedure in deportation. His further argument that he might be subject to persecution if deported to South Korea is an argument of the same category. It not only has no bearing on the issues presented, but is more properly addressed to the discretion of the Attorney General, which has been favorably exercised in this case.[19] See 8 U. S. C. 1253 (h).

Thus, not only did petitioner fail to point out to the hearing examiner any special circumstances which would render the use of depositions unfair in his case, but, even now, he has not been able to show any circumstances which militate against such use of the normal, long-established procedure for taking the testimony of distant witnesses. Petitioner's attack on the order of deportation must, on this record, rest on his broad assertion that he had an absolute right to confront the witnesses against him, as in a criminal trial. The whole course of judicial decision, throughout our history, refutes that contention.

[19] As petitioner acknowledges (Br. 19), he was granted a hearing on this question, and on November 18, 1954, his deportation to Korea was ordered indefinitely postponed.

CONCLUSION

The use of deposition testimony is a well established method of taking the testimony of distant witnesses in administrative and judicial proceedings. Petitioner made no attempt in the deportation hearing to establish and does not here show that this method of proof was unfair in the circumstances of this case. It is therefore respectfully submitted that the judgment of the court below should be affirmed.

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FEBRUARY 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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STATUTE

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IN THE

Supreme Court of the United States

October Term, 1955
No. 201

DAVID HYUN,

Petitioner,

vs.

HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

Respondent Misconceives and Avoids, and Defaults in Making Reply to, the Central and Primary Issue at Bar—Right of Mandatory, Secured Presence as a DUE PROCESS CONDITION OF FAIR TRIAL Wherever Liberty or Life Are Put in Balance by Government.

The first and primary thing to say about the Respondent's Brief is that it does not meet the issue of the cause.

Petitioner's central thesis is not replied to. That thesis is and ever has been that as a matter of **DUE PROCESS**, mandatory, secured right of presence is protected and se-

cured in deportation causes affecting grievously liberty and life *because,* under now established law, *a condition of fair trial.* The right of secured presence was specifically NOT urged by petitioner as arising from or secured by the Sixth Amendment and its criminal-cause provisions, but, in critical difference, as a **DUE PROCESS** right of fair hearing affecting liberty or life, as confirmed and borne witness to in principle and in precedent by criminal state-trial cases before this Court issuing *due process* rights and contents, and due process only, and as confirmed further by due process cases affecting liberty or life without criminal character of any manner, as in insanity confinement proceedings and asexual operations.

To all these matters, at the *core* of the issue of fair trial and right of presence at bar, the Respondent makes *no* reply.

Respondent ignores *Snyder v. Massachusetts,* 291 U. S. 97, and *all* of petitioner's *basic* fair-trial *due process* cases, and suggests, improperly and incorrectly, that petitioner relies "on the Sixth Amendment guaranty of confrontation available to an accused in a criminal proceeding," either directly or "by analogy." (Resp. Br. p. 23.)

NO. Petitioner urges safeguarded, secured right of presence not by right of the Sixth Amendment guaranty of confrontation, directly nor "by analogy"; petitioner urges such right by *due process.*

Respondent, thus, at page 43 of its Brief, states: "The right of confrontation of witnesses guaranteed the accused in a criminal trial derives not from any *fundamental notions of fairness,* implicit in the due process secured by the Fifth Amendment to a litigant in any proceeding, but directly from the Sixth Amendment, which applies by its terms only to 'criminal proceedings.'" (Emphasis added.)

This assertion in *very words* is contradictory to the contrary declaration of this Court in *Snyder v. Massachusetts,* where right of presence is assumed to be a condition of "the *fundamental justice*" (emphasis added) secured by *due process,* and where the right could not possibly have been urged as a right drawn from the Sixth Amendment since there a *state* prosecution only was involved. This Court there stated, in language directly contradicting Respondent here:

> "[Under] the Fourteenth Amendment . . ., the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by [his] absence. . . . [It is indispensable to a fair trial to the extent that it] satisfies the test . . . basic and decisive, [that] it bears, or may fairly be assumed to bear, a relation, reasonably substantial, to . . . opportunity to defend. [To that extent it is an indispensable part of] the fundamental justice assured . . . by the Constitution of the United States."
>
> —*Snyder v. Massachusetts,* 291 U. S. 97, at 107-108 and at 106, and again at 108.

In like misconception of the issues at bar, Respondent cites *Harisiades v. Shaughnessy,* 342 U. S. 580; *Carlson v. Landon,* 342 U. S. 524; *Mahler v. Eby,* 264 U. S. 32; *Bilokumsky v. Tod,* 263 U. S. 149; *Lewis v. Frick,* 233 U. S. 291; *Bugajewitz v. Adams,* 228 U. S. 585; *Zakonaite v. Wolf,* 226 U. S. 272; *Low Wah Suey v. Backus,* 225 U. S. 460, and *Nishimura Ekiu v. United States,* 142 U. S. 651, for the declared proposition assertedly opposing petitioner's brief, that: "This attempt to impose on the deportation process the restrictions which the Constitution impresses on a criminal trial has been forclosed by well-established precedents of this Court to the contrary."

(Resp. Br. pp. 41-42.) But petitioner attempted no such importing of constitutional criminal-rights provisions or restrictions into deportation, but only application of the fundamentals of due process. Respondent's cited cases are not in point; they deal merely with the criminal-rights provisions made applicable by the Constitution only to criminal proceedings or causes; they do *not* deal with the issue of the content and requirements of due process "fundamentals of fair hearing." That is a far different matter. Due process does not reach jury trial, self-incrimination, *ex post facto* and many other matters, and decisions respecting such, in turn, do not reach due process. As this Court succinctly stated in *Snyder v. Massachusetts:*

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, [under due process] unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental [citing cases]. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be securer or wiser or to give surer promise of protection to the prisoner at the bar. Consistently with that amendment trial by jury may be abolished [citing cases]. Indictments by a grand jury may give way to informations by a public officer [citing cases]. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state [citing cases]. What may not be taken away is [due process of law]."

Respondent's cases involve only criminal-rights issues not reaching to due process. *Harisiades* dealt only with

the subject of *ex post facto*. *Carlson* dealt only with jury trial and with the Eighth Amendment right to criminal bail. *Mahler v. Eby* treated of *ex post facto*, again, and *Bilokumsky v. Tod* dealt only with applicability of the principle of self-incrimination. *Lewis v. Frick* concerned matters only of *res judicata*, and *Bugajewitz v. Adams* dealt, again, only with *ex post facto*. *Zakonaite v. Wolf* treated only of jury trial and *ex post facto*, and *Nishimura Ekiu v. United States* was an exclusion case and without reach at all to deportation. *Low Wah Suey v. Backus* is hereafter discussed.

Petitioner had distinguished these cases in category in advance (Pet. Br. pp. 68-69), stating:

> "It is to be emphasized and underlined that petitioner seeks right of presence in deportation as a due process right—NOT as a matter of right derived from the Federal Criminal trial right provisions of the Fifth and Sixth Amendments. It is the Fifth Amendment's command, 'No person . . . shall be deprived of life, liberty or property, without due process of law,' which petitioner invokes—not the provisions in that Amendment and in the Sixth Amendment securing specific rights of procedure in Federal criminal proceedings as such, as the provisions that 'in all [Federal] criminal proceedings' there shall be secured right of jury trial, public hearing, right of counsel and confrontation, the privilege against self-incrimination, and other rights. While some of these rights are also components of due process, not all of them are, and petitioner invokes none of them as direct sources of right in deportation. Petitioner presses, solely, due process of law. . . . By reason of the distinction just stated the instant case is not within the principle of those prior decisions of this Court which have held that deporta-

> tion proceedings are not within the scope and protection of any of the strictly criminal rights provisions of the Constitution [such as cases asserting] . . . that right of jury trial is not secured in deportation causes (*Carlson v. Landon,* 342 U. S. 524, 537), or that the privilege against self-incrimination does not operate there (*United States ex rel. Bilokumsky v. Tod,* 263 U. S. 149; *United States ex rel. Vaitauer v. Commissioner,* 273 U. S. 103), or that the prohibition against *ex post facto* laws is not applicable there (*Bugajewitz v. Adams,* 228 U. S. 585; *Harisiades v. Shaughnessy,* 342 U. S. 580), nor the prohibition against Criminal Bills of Attainder (*Harisiades v. Shaughnessy, supra; Galvan v. Press,* 347 U. S. 522)."

Respondent's preoccupation with *inapplicable* matters, as *ex post facto,* jury trial and the like, make no less evident, and tends even to emphasize, its total ignoring of, and failure to treat of or discuss, the *due process* principles and cases truly in issue at bar. Thus petitioner's *basic* cases of fair-trial due process law, enunciating the minimum contents of a fair hearing where liberty or life is jeopardized, and the *reasons* therefor, are *ignored.*

Petitioner urged that the landmark due process cases of present day procedural Constitutional law—*Moore v. Dempsey,* 261 U. S. 86 (no mob intimidation); *Tumey v. Ohio,* 273 U. S. 510 (no self-interested judge); *Mooney v. Holohan,* 294 U. S. 103 (no state-suborned perjured testimony); *Chambers v. Florida,* 309 U. S. 227 (no use of torture, violence or coercion to extract confessions); *Rochin v. California,* 342 U. S. 165 (no state acts of violence or brutality, as stomach pumping); *Hernandez v. Texas,* 347 U. S. 475 (no discriminatory jury if jury be had); *Powell v. Alabama,* 287 U. S. 45 (right to coun-

sel and to opportunity to confer and prepare); *De Jonge v. Oregon,* 299 U. S. 353 (right to notice of charge laid); and like cases—were all mated in principle one to another, and all in whole, as well, to right of presence. Petitioner urged that the minimum rights in these basic cases were themselves secured, and confirmed that the right of presence equally was and should be secured, as parts of a structure of a fair trial indispensable to public confidence and security in serious judgments and hearings affecting liberty and life.

Moreover, petitioner pressed *Snyder v. Massachusetts,* as heretofore emphasized, confirmed and supported by such companion decisions as *Hopt v. Utah,* 110 U. S. 574; *Dowdell v. United States,* 221 U. S. 325; and *Schwab v. Berggren,* 143 U. S. 442, all as affirming *expressly* the foregoing thesis, and as stating and declaring the right of presence as a *required element* of due process fair hearing where affecting liberty or life.

Notwithstanding the foregoing, in Respondent's Brief:

Snyder v. Massachusetts is not mentioned;
Hopt v. Utah is not mentioned;
Dowdell v. United States is not mentioned;
Moore v. Dempsey is not mentioned;
Tumey v. Ohio is not mentioned;
Mooney v. Holohan is not mentioned;
Chambers v. Florida is not mentioned;
Rochin v. California is not mentioned;
Hernandez v. Texas is not mentioned;
Powell v. Alabama is not mentioned;
DeJonge v. Oregon is not mentioned.

The requirements of due process affecting fair trial of liberty or life are but the requirements of the minimums

of civilization, as this Court has declared. Can Respondent contend deportation, because it is not "criminal" and is outside the strict protection of *ex post facto,* jury trial, criminal bail and other criminal-cause rights only, is outside as well the requirements of the minimums of civilization respecting fair trial for life and liberty as secured by due process of law?

Can deportation be had by a mob hearing, despite *Moore v. Dempsey?*

Can deportation hearing be based on perjured testimony knowingly suborned by the State, despite *Mooney v. Holohan?*

Or, if a jury should be extended in deportation, could deportation be had by a racially-discriminated jury, despite *Hernandez v. Texas?*

Or, could a deportation hearing be conducted by a self-interested judge, compensated in ratio directly to the number of deportees condemned, despite *Tumey v. Ohio?*

In short, can fair trial for liberty or life be denied in deportation, and the standards of law be abandoned? This is the suggestion *sub silento* of Respondent's Brief.

If the foregoing cannot be done, how then can it be suggested that consistent with due process and fair trial there may be abandoned in deportation the single right of an accused person perhaps the most fundamental of all, the elementary right to be *present* at trial and judgment, the requirement that hearing reaching to liberty, body or life be had and conducted only *to the face of the accused, and in his presence.* This Court has said that such right is "scarcely less important to the accused than the right of trial itself" (*Diaz v. United States*), that it

is a right which "cannot be dispensed with" (*Schwab v. Berggren*), and, that, "If [a man] be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." (*Hopt v. Utah.*)

Respondent does not even reply to these due process fundamentals.

Respondent's thesis remains that of the Service and the court below that *private, civil property process* is due enough process for deportation, notwithstanding that liberty, and even jeopardy to life, are in balance, because only the proceedings are denominated "civil" in name and form. Respondent cites cases (Resp. Br. pp. 49-50) and statutory examples (Resp. Br. p. 51), to evidence that in other, various civil matters, where *property* alone is in issue,* the law has liberally accepted use of deposition testimony, without confrontation or necessary right of presence, upon a showing only of balance of convenience. Petitioner does not gainsay this as to such matters. The difference is between hearing fair enough to settle and balance property disputes affecting purely private interests and process fair and sufficient under the Constitution upon which to depend human life, body or liberty.

In example Respondent's cited case *Whitford v. Clark County,* 119 U. S. 522, involved only BFP rights as to fraudulently issued county bonds; *Patapsco Insurance Co. v. Southgate,* 5 Pet. 604, concerned boat damages suffered in an ocean gale; *The Argo,* 2 Wheat. 287, involved a suit in admiralty for property rights and restitution after a

*Or regulatory matters only, not reaching to liberty-imprisonment, body or life.

forfeiture for a false importation; *Pettibone v. Derringer,* 4 Wash. C. C. R., 215, was a patent cause; *Hyam v. American Export Lines,* 213 F. 2d 221, was an action for damages to a tinplate cargo suffered in ocean transportation; and *Gitto v. "Italia,"* 28 F. Supp. 309, was a tort cause for damages arising from accidental injury. Such cases are no measure for fairness and due process as to judgments affecting body, liberty or life, whether as to deposition subjects or any other.

Respondent's statutory deposition examples are comparably revealing. (Resp. Br. p. 51, n. 8.) Thus Respondent cites the deposition rights of the Secretary of the Department of the Interior; that Department has jurisdiction over public lands, mines, Indian claims, and land bounties! Respondent cites the Perishable Commodities Act; this Act affects the labeling and purities of seeds and hays! The Federal Trade Commission, cited by Respondent, is concerned with unfair acts of competition in the conduct of commerce. The Natural Gas Act relates to regulation of reasonable rate charges for natural gas. The Federal Power Act affects like regulation respecting electricity. The Interstate Commerce Commission governs rates and the regulation of interstate railways. And thus with other of Respondent's examples. The Coal Mine Safety Act is directed at closing unsafe mines as accident hazards; the Longshoremen's and Harbor Workers Act administers a workmen's compensation program; the Federal Communications Commission is established to regulate and prevent monopoly in radio broadcasting. The Civil Aeronautics Act regulates pilots, planes and landing strips in travel by air.

The difference between procedure fair enough to suit these civil, regulatory ends and purposes, and process

safeguarded and sufficiently protected in fairness and rights to permit judgment of liberty, body and life is manifest upon merest statement. Perishable seeds, in example, are no standard for comparison to the perishable human items of liberty, body and life.

In like vein and tone Respondent cites *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134* (Resp. Br. p. 51), for the principle, sound as applied there, that administrative agencies should be accorded broad discretion to shape their procedures, including the procedures of hearings. But there the administrative issue concerned was the very antithesis of human rights reaching to life or liberty, and affected only the highly discretionary question of allocating air wave rights between competing applicants for radio broadcasting stations, an area where public-purpose regulation is at maximum weight and individual interests—property in character, only—count in whatever measure for very little. Such a cause ill makes for comparison in rights of procedure to a hearing safeguarded by the Constitution in manner sufficient to determine and judge the fate of a human being.

Respondent cites and lays special reliance upon *United States v. Zucker*, 161 U. S. 475, and on *Hepner v. United States*, 213 U. S. 103, following it. (Resp. Br. pp. 43-45.) But *United States v. Zucker* was a property-matter case, as the Court there pointedly took note of, and involved solely a government suit for a *civil money-judgment*—a money debt to the government measurable by the value

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Cella v. United States, cited in Respondent's Brief at page 61, is similar in character and effect.

of property claimedly imported under false entries made in customs statements. The Court there, while holding the right of confrontation of the Sixth Amendment did not apply because the case there while involving a penalty was a property matter only and was not "criminal," twice observed that the action there involved sought "a judgment for money only" and did not affect or involve "the personal safety of the defendant." (161 U. S. at p. 481, and again at p. 482.) In that case there was issued only an effort to extend—and as such—the criminal-rights provision of the Sixth Amendment granting confrontation to a civil-penalty, property cause. There was not tested there, and could not be, the right of presence as a condition of due process fair trial where proceedings reach in jeopardy directly to liberty, body or life.

So, too, with *Hepner*. It, as well, was but a civil property penalty case, and no more. It is without consequence at bar.

Low Wah Suey v. Backus, 225 U. S. 460 (Resp. Br. p. 45), although a deportation case, did not involve any issue of right of presence, and was decided, indeed, before the deciding of the basic cases affecting and giving content to due process of procedural law, including presence as an element, relied upon by petitioner in the instant cause. More, the decision appears to have been at least partly disposed of on the basis of ill-pleading, it being observed there the petition made no allegations about desired witnesses save "on information and belief,"

and did not in any manner declare "the nature and character" of the testimony not produced. (225 U. S. at p. 470.) Additionally, to the extent that such case suggests a person on trial today in a hearing jeopardizing life, body or liberty might, under present day due process of law, be denied right to compulsory process to secure witnesses in his behalf, it is probably subject itself to reconsideration in the light of later statements by this Court in contrary vein in such cases as *Powell v. Alabama*, 287 U. S. 45, and *Andrews v. McCann*, 317 U. S. 269, 279.

In presenting its blunt, over-simple thesis at bar that private, civil-property process is due enough process for deportation—however liberty or life may be affected thereby—and that, in consequence, civil-property trial right to free use of deposition testimony should be deemed valid there, Respondent, in addition to ignoring petitioner's basic due process cases and the pointed authority of the right-of-presence decision of *Snyder v. Massachusetts*, has ignored also, and totally, the *very* significant area of due process law affecting the subjects of insanity proceedings and asexualization operations. Upon these issues Respondent makes practically no comment—notwithstanding that such proceedings are fully as "civil" (and even as "administrative," under many statutes) a class of proceedings as ever deportation might be classed, and notwithstanding that such proceedings are conceded by all to be curative and regulative in purpose, and not directed at imposing criminal punishment. In principle, and under due process, as demonstrated in Petitioner's Opening

Brief, insanity and asexualization proceedings—despite being civil and curative, require *full* observation of the fundamental requirements of *due process fair trial,* including full right of safeguarded *presence* of the accused. And this, because, as previously quoted in Petitioner's Opening Brief:

> "However, even though an insanity proceeding is [civil in character, and is] primarily for the benefit of the person suspected of being insane, nevertheless depriving a person of his liberty and his freedom . . . and putting him under the stigma of irrationalism is such a serious matter that there should be [required] every proper safeguard."
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> —*In re Moynihan,* 332 Mo. 1022, 1028 *et seq.*

> "Almost as well might we convict a man of crime . . ."
>
> —*Ex parte Allen,* 82 Vt. 365, 373.

> "Insanity is not a crime . . ., nevertheless, confinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail. The Fifth Amendment is applicable . . ."
>
> —*Barry v. Hall,* 98 F. 2d 222, 225.

> "If the Constitution and laws in relation to due process . . . apply to a material thing, they should more so apply to the human element. 'And He said unto them, What man shall there be among you that shall have one sheep, and if it fall into a pit on the Sabbath Day, will he not lay hold on it and lift it out? How much, then, is a man better than a sheep?' "
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> —*Brewer v. Valk,* 204 N. C. 186, 191.

"We are dealing here with legislation which involves one of the basic civil rights of man. . . . The power to sterilize [is a very serious one]. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."

—*Skinner v. Oklahoma,* 316 U. S. 535, 541.

Upon the score of fair hearing and the secured right of presence in insanity proceedings and asexualization cases, Respondent is notably silent and without comment. Plainly Respondent dares not even suggest that under the law full right of presence might be denied or disallowed in such proceedings, notwithstanding their "civil" character, any more than such right might be disallowed in a criminal cause of kindred consequence to the individual. Respecting such proceedings Respondent says only that they "arise under special legislation [and] involve problems of state court supervision of defectives who are incapable of managing their own affairs." (Resp. Br. p. 24, and see p. 45), a statement which passes totally the significance of such decisions in the instant premises—the security by due process in such "civil" causes of full, mandatory right of presence because of the consequences there of judgment upon liberty, body or life.

II.

The Record Demonstrates Weakness Not on the Part of Petitioner but of Respondent—for Undertaking the Use of Depositions, in Denial of Presence Utterly NEEDLESSLY, and for CONVENIENCE Only.

Respondent adverts to the Record at some length (Resp. Br. pp. 29-41, 4-23) and seeks to belittle and minimize petitioner's objections to the deposition-procedure had below. Respondent suggests and intimates petitioner did not object soon enough and long enough to the deposition taking, did not make sufficient or early enough claim that he was without financial capacity to pay for the moving of guards, himself and counsel to Hawaii to register presence there, did not "make any showing" of "any special reason why it was necessary that [he] confront the witnesses" (Resp. Br. pp. 21, 32), nor any "showing" why it was "impractical" for him to use cross interrogatories in writing in place of presence and cross-examination or to associate counsel in Hawaii to cross-examine without him and to take his place in terms of presence and confrontation. (Resp. Br. pp. 34-35.) From such supposed factors Respondent suggests this Court should conclude that petitioner was "less interested in meeting the thrust of the deposition testimony than in attempting to create a situation on which he could later build an argument of prejudicial error" and that "the weakness of his case before the Service arose, not out of any denial of procedural fairness, but because he elected not to contest on its merits the case against him." (Resp. Br. pp. 40-41.) Respondent cites *waiver* cases (Resp. Br. p. 64, n. 18); *Moncado v. Ramsey,* 167 F. 2d 191; *United States ex rel. Karpathiou v. Schlotfeldt,* 106 F. 2d

928; *Ranieri v. Smith,* 49 F. 2d 537; *United States v. Goldstein,* 271 Fed. 838, and *United States ex rel. Diamond v. Uhl,* 266 Fed. 34. The cited cases affect *real* election—with full, free choice—to forego cross-examination, by aliens present and confronted by, or offered and tendered confrontation of, the witnesses concerned. Such is in no manner the case at bar.

Petitioner was not required or called on to show a "special" reason why he should be accorded at all times in his hearing the minimum, basic trial right of *presence.* Petitioner's objection to being denied right of presence by the Hawaiian depositions as violating and denying due process. and as denying right to be present, right to confrontation of witnesses, and to cross-examination, and denying right to representation by, and consultation with, counsel, and petitioner's *repeated* request that either the witnesses be ordered produced at the Los Angeles hearings or that he and his counsel be transported, at minimum cost and burden to the government, to Hawaii to confront and cross-examine the witnesses [Pet. Op. Br. p. 8; R. 114-119, 122, 123, 129, 133 and 216-220], were a more than sufficient raising of objections and of claim of constitutional rights and privileges. Waiver is not lightly or artificially inferred where deep and fundamental constitutional rights are at stake. (*Johnson v. Zerbst,* 304 U. S. 458, 464; *Glasser v. United States,* 315 U. S. 60.) The fair and real test of the sufficiency of the making of objections by petitioner to the depositions below is the circumstance that it is plain beyond cavil upon the Record that no one on the government's part failed fully to understand petitioner's several objections as above stated, or failed to realize his insistent declaration of his claim of right that either the witnesses be produced to

confront him or that he and counsel be produced by the government in Hawaii to confront the witnesses. There was no absence of understanding, there was simply a repeated ruling by the Government Hearing Officer that in deportation right of confrontation and presence need not and would not be respected, and that petitioner would not be accorded, on *any* basis, either of his requests. [Pet. Op. Br. p. 8; R. 117, 119, 130, 132-133, 216 and 220.]

Respondent objects that petitioner did not protest the taking of the depositions in a full or complete statement of objections at the hearing meeting preceding their taking, and suggests further that petitioner was there "given the opportunity to expand his objections in a written brief" but "failed to do" so (Resp. Br. p. 6), inferring this handicapped the Hearing Officer by depriving him of a full statement of petitioner's claim of rights. But the Record at pages 118-119 makes the explanation very evident—counsel was *not permitted* by the Hearing Officer to finish stating his objections at such opening hearing, and the "written brief" adverted to by Respondent was a brief to be directed (by statement of the Hearing Officer himself) not to the Hearing Officer but to the Commissioner of Immigration after the hearings should be completed. Witness the Record at pages 118-119:*

"By Counsel:

I want to state at this time, Mr. Hearing Officer, that this is an arbitrary and an unjust and undemo-

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*The Court below has noted the practice in immigration hearings of discouraging and preventing full statement of objections at administrative hearings in *Maltez v. Nagle* (C. C. A. 9th), 27 F. 2d 835, 837, stating, "Under some general rule of practice before the inspector the alien is discouraged from particularizing his objections or stating the reasons therefor. Counsel was so admonished again and again in this case."

cratic ruling, and one of the most unjust I have had the displeasure of having before any court that purported to deal out justice. [Fol. 94.] The Examining Officer has merely made a motion to take depositions of certain named persons, has not stated what he expects to obtain in those depositions, has not stated why those depositions cannot be taken here in Los Angeles, why the persons cannot be present, has not offered to have counsel or the respondent or both present at the Government's expense—no reason whatsoever offered. You haven't even listened to my objection to the motion, and yet you grab the motion and overlook my objections, notwithstanding that I haven't even finished making them. . . .

By Hearing Officer:

The ruling still stands. Counsel may enlarge on his exceptions in his brief.

By Counsel:

Q. To who, may I ask!

By Hearing Officer:

A. It will go to the Commissioner of the United States Immigration and Naturalization Service—

By Counsel:

Who has already stated that he has no authority to change that ruling, pending a final order of deportation! The ruling lies solely and exclusively with you, Mr. Hearing Officer. The responsibility is yours! . . .

[Fol. 96.] By Hearing Officer:

The hearing is continued, and counsel and the Examining Officer will be notified of the date of the resumed hearing. Adjourned: 11:50 A. M."

More, by the time the hearings were completed the Hearing Officer was several times, indeed *repeatedly*, directed to petitioner's several constitutional objections

to the taking of the depositions or their introduction against him without his presence, and was asked again and again to either produce the witnesses at Los Angeles or to produce petitioner and counsel at Hawaii, at least for cross-examination. [Pet. Op. Br. p. 8; R. 114-119, 122, 123, 129, 133.] The rulings of the Hearing Officer uniformly denied these motions and objections, and on their *merits,* not on procedural basis or on any matter of form or time. [Pet. Op. Br. p. 8; R. 117, 119, 130, 132-133, 216 and 220.]

Respondent complains petitioner did not show that he was without financial ability to pay to privately transport himself, guards and his attorney to Hawaii, prior to the argument made before the Board of Immigration Appeals. The reply is plain. Firstly, such showing or claim by petitioner should be needless in law to secure grant of a matter fully of *right,* such as is security of presence, and in any event, at the initial administrative hearing level the circumstance of such inability on petitioner's part was so evident to all concerned as to have been questioned by no one and to have been *assumed* by all.

More, petitioner did specifically assert his financial inability so to act, as a circumstance of aggravation, in his argument before the Board of Immigration Appeals [R. 63], as Respondent concedes. Objection to the Board of Immigration Appeals, which is objection as well to the Attorney General, is a timely enough raising of an objection because addressed to the body possessed with *ultimate authority,* as this Court determined and held in comparable premises in *Bridges v. Wixon,* 326 U. S. 135. Additionally, the Board of Immigration Appeals entertained the objection of financial inability, whether strictly timely or not, and passed and ruled thereupon on the

merits. The Board disallowed such objection and factor not on procedural or formal grounds, but on substantive basis directly:

> "Counsel now contends that the alien is not financially able to send a representative to Honolulu to appear for him, and was not able to do so in November or December of 1950. There is no provision of law or regulations which requires that the United States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the State of California and depositions were taken in Hawaii."
>
> —Opinion of Board of Immigration Appeals, Record p. 58.

The Court of Appeals below also considered and rejected the objection of financial inability *on the merits.*

> "It is contended by appellant that the action of the Immigration Service in taking the depositions of Uesugi and Izuka in Honolulu, while he was in custody in California, deprived him of the essential ingredients of due process of law. The argument is that not only was Hyun in the custody of appellee at the time the depositions were taken but that he was financially unable to transport his counsel to Honolulu or procure Honolulu counsel to represent him at the depositions. In view of the comparative financial resources of Hyun and the Government of the United States, and in further consideration of the plethora of government transportation between Hawaii and the West Coast, it is appellant's contention that the Government should have transported the witness to the West Coast for the depositions, or in the alternative provided transportation to Hawaii

> for Hyun and his attorney. * * * This Court has repeatedly held that financial inability of an alien to insure attendance of himself or his attorney, or both at the place where depositions are being taken is not a denial of due process. As was stated in *Bhagat Singh v. McGrath,* 1939, 9 Cir., 104 F. 2d 122, 123: 'Deportation hearings are civil in nature and the alien need not be confronted by the witnesses; evidence may be obtained by deposition. * * * We have heretofore decided that the fact that an alien is financially unable to travel to a place where he could cross-examine the witnesses, or send an attorney is not a denial of the right of cross-examination.' "
>
> —*Hyun v. Landon,* 219 F. 2d 404, 406-7, R. 45, 47-8.

Indeed, as the statement of the Court below makes evident, that Court had previously ruled to like effect and had made financial inability a determined issue within its circuit by decisions long predating the hearing below.

Respondent's Record.

Actually, in terms of the Record, the true weakness revealed below, and which Respondent cannot avoid, is the utter poverty of *cause* on Respondent's part for undertaking the depositions below in denial of right of presence. The witnesses whose depositions were taken were all alive, and upon the Record were all well and hearty, and they all resided within the Federal jurisdiction of the United States and were fully answerable to Federal process. It does not even appear Respondent so much as *asked* the witnesses to appear in Los Angeles before moving to hold the foreign depositions. Now Respondent is reduced to speculating and *imagining* that perhaps one or more

of the witnesses might have been sick and unable to travel, or been too old and infirm to be so transported. (Resp. Br. p. 33.) Such imaginings are without basis whatever in fact in the Record and are without weight or avail now; they but disclose Respondent's weakness and absence of right in its action below. Where secured by right to fair trial, and by due process, the right of presence yields to deposition testimony only where a witness is deceased, sick, insane, incompetent, or is beyond the jurisdiction and reach of process of the government—all circumstances of true impossibility of production. None of these obtained or were suggested as obtaining below. *No* cause was suggested, at the time of taking the depositions, or *ever,* below, save that the witnesses resided in Hawaii and it would better suit, presumably, the *convenience* of government or of the witnesses, or both, to have trial without presence in Hawaii 3,000 miles from petitioner's point of incarceration and of his hearing. [Pet. Br. p. 5; R. 118.]

The Record points unalterable responsibility at Respondent. Due process is not the process had below, with the fundamental of presence sacrificed for convenience only, where life and liberty are in balance.

The full and perfect answer to the question of strength and weaknesses in the Record as stirred by Respondent in its Reply Brief, is simply this—this *identical* record, altered in no particular whatever, would be stricken down under due process *out of hand* if such record had occurred in an insanity proceeding, a bodily operation cause, or in criminal hearing for even the meanest of misdemeanors. This is not, in any view, a Record upon which liberty and life can by due process be made forfeit.

III.

The Service's Regulations and Past Administrative Practice.

In addition to other matters Respondent points also to authorization in its present and prior administrative regulations to take and use depositions, and even to take and employ for evidence purposes *ex parte* statements and affidavits completely privately taken, and urges that in instances in the past Circuit Court cases have sustained use in deportation either of depositions or of such completely privately taken *ex parte* statements or affidavits. Respondent cites (Resp. Br. pp. 55, 56, 46, 64), the decisions: *Bhagat Singh v. McGrath,* 104 F. 2d 122 (C. A. 9); *Naranjan Singh v. District Director,* 96 F. 2d 969 (C. A. 9); *Kishan Singh v. District Director,* 83 F. 2d 95 (C. A. 9); *Channan Singh v. Haff,* 103 F. 2d 303 (C. A. 9); *Navarrette-Navarrette v. Landon,* 223 F. 2d 234 (C. A. 9); and *Choy Gum v. Backus,* 223 Fed. 487 (C. A. 9). Also: *Berkman v. Tillinghast,* 58 F. 2d 621 (C. A. 1); *Ng Wing v. Brough,* 15 F. 2d 377 (C. A. 2); *Diamond v. Uhl,* 266 Fed. 34 (C. A. 2), and *Impastato v. O'Rourke,* 211 F. 2d 609 (C. A. 8).

It is true that the Court below (Ninth Circuit) has ruled depositions, and even *ex parte* statements, admissible in deportation on the principle merely that such proceedings are "civil." The several *Singh* decisions, and the *Choy Gum* case, illustrate this, as does the case at bar. And, following such thesis to its ultimate, in the *Bhagat Singh* and *Kishan Singh* cases, and the case at bar, that Court, and in the *Berkman v. Tillinghast* case, the First Circuit, has held even that depositions in deportation are admissible though taken at any distant point and for whatever reason, and despite even financial inability by the

accused alien to travel with or without counsel to the situs. The validity of such thesis is the issue in the cause on review here.

In many other Circuit Court decisions a quite contrary view is represented and expressed, and right to cross-examination and confrontation is asserted as indispensable utterly to fair deportation trial, at least where affecting any substantial and material portion of the evidence and cause: (*Sardo v. McGrath*, 196 F. 2d 20, 22 (C. A. D. C.); *Gonzales v. Zurbrick*, 45 F. 2d 934, 937 (C. A. 6); *In re Chan Foo Lin*, 243 Fed. 137, 142 (C. A. 6); *Svarney v. United States*, 7 F. 2d 515, 517-518 (C. A. 8); *Ungar v. Seaman*, 4 F. 2d 80, 82, 84-85 (C. A. 8); *Hays v. Sesto*, 12 F. 2d 698, 700 (C. A. 8); *Hays v. Zahariades*, 90 F. 2d 3, 6 (C. A. 8); *Whitfield v. Hanges*, 222 Fed. 745, 749, 752-755 (C. A. 8); *cf.* even the Ninth Circuit decision in *Maltez v. Nagle*, 27 Fed. 835, 837 (C. A. 9)).

In Respondent's remaining cited cases, *Ng Wing v. Brough, Diamond v. Uhl, Impastato v. O'Rourke* and the *Navarrette-Navarrette* case, the question of use of statements or depositions were not squarely reached, at least not as at bar, since in each such case there was more than ample evidence and basis to sustain the deportation concerned without reaching the questioned matters. In the *Navarrette* case the alien made a complete case for his deportation in his own admissions and testimony. In *Impastato v. O'Rourke* the questioned matters related only to alienage and there was evidence of such in public documents produced under seal from Italy, and also in the statutory burden imposed on the alien respecting alienage and in contradictions and unconvincing explanation of circumstances given by him in his own testimony. In *Ng Wing v. Brough* the testimony of the arresting officers

made a more than full and sufficient case against the alien, and the questioned matters were matters of surplusage only. Similarly in *Diamond v. Uhl* the alien made a real and actual waiver as to production and cross-examination of the witness whose statement without confrontation and cross-examination was later complained of, since several identical witnesses were confronted and cross-examined freely and the alien made no request for production of the one witness not thus produced, though opportunity so to do existed at two different times of hearing. In *Weinbrand v. Prentis,* 4 F. 2d 778 (C. A. 6), cited Respondent's Brief, page 64, there was an express waiver entered by the attorney for the alien, and, additionally, there was more than ample independent evidence to separately establish deportability.

Petitioner does not endorse the procedure in the cases above permitting use of statements followed by direct confrontation and cross-examination at the deportation hearing, a practice which happily now seems to have ceased to be employed by the Service for some time; but the observation is here made that the actual production of the witness for confrontation and cross-examination avoids in great part the objections to use of statements or depositions and certainly removes such cases from comparison to such cases as at bar where presence, confrontation and cross-examination are never afforded or extended.

The short and complete answer to Respondent's reliance on past practices and its own Regulations is that the Regulations cannot modify, alter or amend the Constitution, nor its requirements, and as to the past decisions of lower courts, few such reach the cause at bar, save those of the Court below, since most were avoided by other, curative acts, or by independent evidence or the testimony of the alien himself, and such decisions as suggest approval in

any measure of the procedure below are in conflict with the highest authority of the land—the Constitution.

Declaration so is required.

IV.

Aggravated Circumstances at Bar.

In addition to avoiding the basic Constitutional thesis of right of presence as a condition and requirement of due process fair trial where affecting liberty or life, Respondent avoids as well, and makes no response to, special and particular circumstances of the cause at bar aggravating the Constitutional wrong and injury:

1. The depositions were the *sole* evidence against petitioner. To this extreme circumstance of aggravation, separating petitioner's case from every case of lesser degree, Respondent makes, and can make no response. Petitioner's cause violates constitutional right unless in a life and liberty matter, due process can suffer the extreme circumstance of *total trial in absentia.*

Moreover, identification was had *only* by a passport photo bearing *on its face* petitioner's name. Respondent suggests this caused no harm because petitioner himself testified the picture was of him. This does not reach the error of the manner of identification complained of. To that error Respondent makes, and can make, no reply.

2. The depositions were had and ordered *needlessly,* and for the government *convenience* only. The witnesses were alive, and well and hearty, and within the jurisdiction, and no consideration save mere convenience only, of witnesses or of the Government, existed and was even suggested to support or justify

the use of the depositions below. Respondent cannot and does not respond to this.

3. The jeopardy of deportation at bar includes a jeopardy to life or of physical persecution. Respondent cannot and does not respond to this aggravated circumstance, save only to suggest the granting in the instant cause, at present, of an administrative stay reduces the jeopardy. But the jeopardy nonetheless remains, for such administrative stay is impermanent and without statutory security.

4. The depositions were abusively conducted, and were without restraint by the Hearing Officer in Hawaii. Respondent suggests such officer *could have* exercised judicial restraining force, and was not "a mere notary" in power (Resp. Br. p. 63); but the relevant circumstances is not that such officer could have, but that on the plain Record he *did not* exercise restraining force. Respondent makes no response to this.

5. The area of the depositions was within the area of freedom of speech and association particularly requiring careful trial of fact, as well as careful enacting and applying of rules and standards of law, by this Court's decisions.

Wherefore, for all of the reasons contained in Petitioner's Opening Brief and set forth above, the judgment below should be reversed.

Respectfully submitted,

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WILLIAM B. MURRISH,
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Of Counsel.

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IN THE

Supreme Court of the United States

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No. 201.

DAVID HYUN,

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HERMAN R. LANDON, District Director, Immigration and Naturalization Service,

Appellee.

Brief of American Civil Liberties Union, Southern California Branch, Amicus Curiae.

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ARGUMENT.

I.

An Alien Is Entitled as a Matter of Constitutional Right to a Reasonable Opportunity to Confront and Cross-Examine Adverse Witnesses in Deportation Proceedings.

A.

The Mere Fact That Deportation Is a Civil Matter Does Not Reduce the Alien's Constitutional Right to Procedural Due Process of Law.

The right of a resident alien to a full and fair hearing is, by now, firmly fixed in our constitutional constellation

(*Kwong Hai Chew v. Colding,* 344 U. S. 590; *Johnson v. Eisentrager,* 339 U. S. 763, 770, 771; *Wong Yong Sung v. McGrath,* 339 U. S. 33, 50, 51; *Bridges v. Wixon,* 326 U. S. 135).

Yet, the purpose and spirit of this fundamental principle seems to have utterly eluded the Attorney General and the Courts below.

The primary objective of a hearing is to pursue, discover and expose truth, that justice might be done. Due process of law is simply a recognition that truth is seldom, if ever, revealed *ex parte.* Therefore, if due process rises to the stature of a constitutional right, then obviously it belongs to all who fall within its orbit.

Even if our Constitution does not protect from deportation the alien who was formerly a member of the Communist Party (*Galvan v. Press,* 347 U. S. 522), it should, and does, guard his right to disprove that charge.

Throughout these proceedings, however, procedural Due Process seems to have been regarded as a dichotomous formula which somehow earns judicial cognizance only in criminal cases (see, for example, the opinion of the Court of Appeals below, in 219 F. 2d 404, 406). It is not clearly understood by *Amicus*—perhaps because it is not fully comprehended by its advocates—just why truth and justice should be pursued with any less fervency in a civil suit, unless it is felt that a defendant accused of committing a crime is in jeopardy of life or liberty, rather than the mere loss of his property. If this is the key which opens the door to the hearing room wherein is dispensed a "fuller and fairer" justice, then manifestly the petitioner qualifies for admission: throughout the

administrative proceedings he was detained in the custody of the Attorney General, without right of bail [S. R. 325, 106, 109, 110; see also, *Hyun v. Landon,* 187 F. 2d 991, 342 U. S. 524].[1] He is at all times subject to rearrest, and detention, if the Attorney General, in his discretion decides upon this course (Title 8, U. S. C. A., §1252(a), (c); Immigration and Nationality Act of 1952, Section 242(a), (c), Public Law 414, 82nd Congress, 2nd Session, Ch. 477). Moreover, petitioner risks being returned to a country where he may suffer and expect persecution (see Petition for Certiorari herein, footnote p. 28).

This Court has sometimes had occasion to comment upon the severity of our deportation laws, especially where expulsion is attributable to past political associations. It has described deportation as "a practice that bristles with severities," (*Harisiades v. Shaughnessy,* 342 U. S. 580, 587); as the "equivalent of banishment or exile" (*Delgadillo v. Carmichael,* 332 U. S. 388, 391); and which "may result in the loss of all that makes life worth living" (*Ngo Fung Ho v. White,* 259 U. S. 276, 284; *Bridges v. Wixon,* 326 U. S. 135, 147); and that the "intrinsic consequences of deportation are—close to punishment for crime . . . (*Galvan v. Press,* 347 U. S. 522, 531). Unfortunately, however, this Court has declined to qualify the power of Congress to regulate the entry and expulsion of aliens by application of the Due Process Clause, because "the slate is not clean." (*Galvan v. Press, supra,* at p. 531.)

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[1]S. R. refers to the record of the proceedings before the Immigration and Naturalization Service; the page of such reference follows.

But with respect to procedural Due Process, the slate is very clean (*Galvan v. Press, supra,* at p. 531); and it is respectfully urged that upon it should be enscribed the same vigorous caveat which has been postulated for other civil proceedings affecting the life, liberty and conscience of individuals (*cf. Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123; *Kwock Jan Fat v. White,* 253 U. S. 454; *Morgan v. United States,* 304 U. S. 1; compare *Peters v. Hobby,* ..... U. S. ....., 23 L. W. 4311).

B.

Wherein the Slate Is Clean: The Right of Confrontation and Cross-Examination Is Inherent in the Constitutional Concept of Due Process of Law.

Cross-examination has been described by one writer as "the greatest legal engine ever invented for the discovery of truth."[2] Certainly, it forms the essence of any hearing which seeks recognition by the Constitution.

Historically, the concept of cross-examination in Anglo-American jurisprudence has its origin in the gradual evolution of the Hearsay Rule. It is an interesting coincidence that the Rule was first pressed into service at a time when Englishmen were banished for political "crimes" by attainder, simply upon the strength of an *ex parte* deposition read in Parliament.[3]

This led Parliament, during the reign of Edward VI, to enact a law providing "that accusers (that is, wit-

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[2]Wigmore on Evidence, 3d Edition, §1367, p. 29.

[3]*Ibid.*, §1364, p. 19, where Wigmore reports the following account of Henry VIII's reign:

"1696, Bishop Burnet, arguing in the House of Lords, at Fenwick's trial, 13 How. St. Tr. 537, 752:

'there passed many attainders in that reign (of Henry VIII), only upon depositions that were read in both houses of Par-

nesses) should be examined face to face, if they were alive."[4] A similar statute was enacted in 1554, but thereafter both fell into obscurity until the early 18th Century.[5]

In the meanwhile, history recorded the lessons of the trials of men like Sir Walter Raleigh, who was tried, convicted and executed without opportunity for first confronting Lord Cobham, his accuser;[6] the Chief Justice presiding over Raleigh's trial contending that "he had no law for it."[7]

In the middle of the 1600's, however, the notion came gradually to prevail that even an extra-judicial statement, under oath, should not be used if the deponent was unavailable for trial.[8] Significantly, this idea took hold in both criminal and civil trials, until, by the time of the American Revolution, confrontation was an accepted principle of law with which the framers of our Constitution were thoroughly familiar (compare *Japanese Immigration case:* 189 U. S. 86, 100, 101).

Confrontation is not sought simply to gaze upon the countenance of the witness, or to be gazed upon by him,

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liament. It is true there were much blamed, and there was great cause for it . . . In Edward VI's trial, the lord Seymour was attained in the same manner (sc. without being heard), only with this difference, that the witnesses were brought to the bar and there examined, whereas formerly they proceeded upon some depositions that were read to them. At the Duke of Somerset's trial (in 1551), which was both for high treason and for felony, depositions were only read against him, but the witnesses were brought face to face, as he pressed they might be . . ."

[4]*Ibid.*, at §1364, p. 19.

[5]*Ibid.*, at §1364, p. 20.

[6]William O. Douglas, *An Almanac of Liberty*, p. 144.

[7]Wigmore on Evidence, 3d Ed., §1364, p. 20.

[8]*Ibid.*, §1364, p. 21 (see also footnote 47 therein).

but rather for the purpose of cross-examination which can effectively be had only by putting to the witness directly and personally questions involving facts with which he is intimately familiar, and to secure immediate answers to those questions.[9] It is obvious that the appearance of counsel only at a deposition proceeding, or the submission of written interrogatories, in no way comports with the virtue or the aims of confrontation (*Kwock Jan Fat v. White,* 253 U. S. 454, 464; *Crowe v. Peters,* 63 Mo. 429, 433; *Anderson v. Snyder,* 91 Conn. 404, 99 Atl. 1032).

While there may well be circumstances in which the enforcement of this right is superseded by other considerations, where life or liberty are at stake the full opportunity of confrontation is indispensable (*Cf. Wong Yang Sung v. McGrath,* 339 U. S. 33, 50, 51; *Kwong Hai Chew v. Colding,* 344 U. S. 590, 598; *Kwock Jan Fat v. White, supra,* p. 464). Indeed, the foremost authority in the field of evidence has observed that:

> "The whole practice and spirit of our statutes and decisions insists on this principle (of confrontation) as a fundamental one. In civil cases every statute dealing with depositions . . . and in judicial decisions not controlled by statute . . . this requirement has been deemed essential in every court and in every forum of proceeding. . . . In short, however, radically the jury-trial rules of Evidence may be dispensed with . . ., this one at least remains as a fundamental of fair and intelligent investigation of disputed facts.[10]

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[9] *Ibid.,* §1395, p. 123.

[10] *Ibid.,* §1400, pp. 144, 145.

II.

The Opportunity for Cross-Examination in the Instant Case, if It Existed at All, Was Inadequate.

Up to this point, it has been urged that an alien is entitled as a matter of constitutional right to a full and fair hearing; and that such a hearing includes the opportunity to confront and cross-examine adversary witnesses. Yet, it is axiomatic that unless the opportunity for confrontation is adequate, and is offered in good faith, then there is really no opportunity at all. *Amicus* believes that opportunity in the sense used here must be realistic, not a sham; that it must be fair in the light of the circumstances in the case, and not a mere pretense. *Amicus* believes further that this interpretation is blessed with Congressional as well as Constitutional expression in the deportation field.

When the administrative proceedings below were commenced late in 1950, the Administrative Procedure Act[11] was still in operation (*Wong Yang Sung v. McGrath*, 339 U. S. 33). The provision peculiarly in point was section 6(c) (1006(c)), the relevant portion of which reads as follows:

> (c) *Evidence.*—Every party shall have the right to present his case of defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts . . ."

Within six months of the *Sung* decision, Congress enacted a rider to an appropriation bill which expressly exempted deportation procedures from application of sec-

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[11]Title 5, section 1001, *et seq.*, Act of June 11, 1946.

tions 5, 7 and 8 (1005, 1007, 1008) of the Administrative Procedure Act (64 Stat. 1048); but by the same action. left section 6 in force.

It is true that there is nothing in the language of section 6 suggesting the scope of the term "opportunity," although unquestionably it creates a *right* to cross-examination in order to disclose the true facts. Congress does not invest "rights" in aliens lightly. The term must have some significance. Moreover, Congress apparently employed that term in the interest of promoting truth. If truth is the criterion of justice, and the objective Congress is seeking, then it is incumbent upon the Hearing Officer in a deportation proceeding to cause witnesses to be available to the alien for cross-examination, and, incidentally, that he himself might observe their demeanor. What other meaning, what other function, can a "right" serve but to assure the alien of due and fair process in the presentation of his defense.

In any event, the language of section 6 was approved and adopted by Congress, in the face of considerable judicial authority on this issue. As the opinion of the Court of Appeals below indicates, this authority is divided. None of it, so far as *amicus* could ascertain, discusses the application of section 6 to the problem. On the other hand, the decisions declaring the alien's right to cross-examination appear to have been affirmed by Congress when it left section 6 intact. Thus, a denial of an opportunity to cross-examine witnesses was held to violate due process in *Sardo v. McGrath,* 196 F. 2d 20, 22 (1951); and was regarded as arbitrary, unfair and violative of constitutional rights in *In re Sugano,* 40 F. 2d 961, 962. The admission into evidence, even without objection, of an *ex parte* affidavit was deemed a denial

of justice in *Svarnly v. United States*, 7 F. 2d 515, 517, and in *Maltez v. Nagle*, 27 F. 2d 835, 837; while in *Gonzales v. Zurbrick*, 45 F. 2d 934, a court deemed the hearing unfair where the hearing officer failed to specifically *offer* to the alien the opportunity to cross-examine a witness.

If Congressional intention is not clearly evidenced by judicial precedent preceding section 6 of the Administrative Procedure Act, surely that intent comes to the fore with the passage of the Immigration and Nationality Act of 1942, section 242(b) 3 (Title 8, §1252(b)(3)). That subsection reads:

> "The alien shall have a *reasonable opportunity* to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government . . ." (Italics ours.)

The language of the new law does nothing to devitalize section 6 of the Administrative Procedure Act, which it replaced, nor the judicial precedent just discussed. Indeed, Congress seemingly has crystallized the judicial formula expressed in *Whitfield, et al. v. Hanges*, 222 Fed. 745, 749, and later adopted in *Hays v. Sesto*, 12 F. 2d 698, at p. 699:

> "Indispensable requisites of a fair hearing, according to those fundamental principles, are that the course of the proceeding *shall be appropriate to the cases and just to the party affected*";

which includes the

> "opportunity to be heard that he may if he chooses, cross-examine the witness against him." (Italics supplied.)

In the light of the foregoing, it is difficult to see how the conduct of the administrative proceedings below achieves any semblance of fair play and decency. If the objective of a hearing is to discover the truth of the matter, then that purpose escaped the attention of the Hearing Officer. He exhibited not the slightest concern as to how the petitioner might confront the government witnesses, either in Los Angeles or Hawaii [S. R. 89-95]. He appeared wholly disinterested in whether petitioner was aware of his right to appear personally in Hawaii, assuming such was the case (*Gonzales v. Zurbrick*, 45 F. 2d 934).[12]

Yet, this callous disregard of the petitioner's rights is defended on the ground that he failed to indicate a desire to appear at the taking of the depositions [S. R. 244].[13]

Although the appellant was held in custody by the Attorney General, the Hearing Officer did not even bother to explore the possibility of arranging for the transportation of the witnesses to Los Angeles, or, in the alternative, of the petitioner to Hawaii. The Attorney General, and the Courts below, endeavor to support this position with the claim that "there is no law for it." It is respectfully submitted that "the law for it" is embodied in the Constitutional right to Due Process of Law, and in the ordinary precepts of fair play and common sense. Particularly is this so where, as here, important Consti-

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[12]An inquiry into petitioner's right to appear in Hawaii was certainly in order inasmuch as he received, while in custody of the Attorney General, a written notice of time and place of the taking of depositions, the language of which leaves the strong impression that only his counsel would be allowed to attend.

[13]But see S. R. 94, where counsel's objections to the motion for leave to take depositions are placed on this very ground, and left unanswered.

tutional rights of speech and association are being adjudicated. The Attorney General's argument secures justice only for the alien of means. But Due Process of Law should be available to all, "not merely to those who can pay their own way."[14]

Respectfully submitted,

A. L. WIRIN,

HUGH R. MANES,

Attorneys for Amicus Curiae.

[14] *Murdock v. Pennsylvania*, 319 U. S. 105, 111.

MARCH 26, 1956.

Decision Per Curiam.

No. 201. HYUN *v.* LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Certiorari, 350 U. S. 816, to the United States Court of Appeals for the Ninth Circuit. Argued March 5, 1956. Decided March 26, 1956. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *William B. Murrish* argued the cause for petitioner. With him on the brief was *John W. Porter*. *Beatrice Rosenberg* argued the cause for respondent. With her on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Olney* and *Carl H. Imlay*. *A. L. Wirin* filed a brief for the American Civil Liberties Union, Southern California Branch, as *amicus curiae*, supporting petitioner. Reported below: 219 F. 2d 404.